No. 87-5677-CFH
Status: GRANTED

Title: Warren Lee Harris, Petitioner
v.
Marvin Reed, Warden, et al.

Docketed:
October 16, 1987

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Anderson,Kimball R.

Counsel for respondent: Donatelli,Jack, Madsen,Terence M.

Entry	Date	Note	Proceedings and Orders
1	Oct 16 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 19 1987		DISTRIBUTED. December 4, 1987
8	Dec 21 1987		Supplemental brief of petitioner Warren L. Harris filed.
9	Dec 29 1987		DISTRIBUTED. Jan. 15, 1988.
7	Dec 30 1987	F	Response requested.
10	Jan 29 1988		Brief of respondent Marvin Reed in opposition filed.
11	Feb 4 1988		Reply brief of petitioner Warren L. Harris filed.
12	Feb 11 1988		REDISTRIBUTED. February 26, 1988
14	Feb 29 1988		REDISTRIBUTED. March 4, 1988
16	Mar 7 1988		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
17	Mar 21 1988	G	Motion of petitioner for appointment of counsel filed.
18	Mar 21 1988		DISTRIBUTED. March 25, 1988. (Motion of petitioner for appointment of counsel).
19	Mar 28 1988		Motion for appointment of counsel GRANTED and it is ordered that Kimball R. Anderson, Esquire, of Chicago, Illinois is appointed to serve as counsel for the petitioner in this case.
20	Apr 14 1988		Joint appendix filed.
21	Apr 20 1988		Brief amicus curiae of Natl. Legal Aid and Defender Assn. filed.
22	May 4 1988		Brief of petitioner Warren L Harris filed.
25	May 13 1988		Record filed.
		*	Certified copy of original record received.
24	May 17 1988		Order extending time to file brief of respondent on the merits until June 11, 1988.
26	May 31 1988		Brief amicus curiae of Florida filed.
28	Jun 9 1988		Brief amicus curiae of California filed.
27	Jun 10 1988		Brief of respondents Marvin Reed, et al. filed.
29	Jul 6 1988		CIRCULATED.
30	Jul 11 1988		Reply brief of petitioner Warren L. Harris filed.
31	Jul 15 1988		Set for argument. Wednesday, October 12, 1988. (4th case) (1 hr.)
32	Oct 3 1988	X	Supplemental brief of petitioner Warren L. Harris filed.
33	Oct 12 1988		ARGUED.

EDITOR'S NOTE

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No. 87-5677

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

UNITED STATES OF AMERICA Ex Rel.

WARREN LEE HARRIS,

Petitioner,

-vs-

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. THERE IS A DIRECT CONFLICT BETWEEN THE FIFTH AND TENTH CIRCUITS, ON THE ONE HAND, AND THE THIRD AND THE SEVENTH CIRCUITS ON THE OTHER, AS TO WHEN HABEAS REVIEW SHOULD BE ALLOWED WHEN A STATE COURT HAS ADDRESSED BOTH THE PETITIONER'S PROCEDURAL DEFAULT AND THE MERITS OF HIS CLAIM.

2. DOES WAINWRIGHT V. SYKES REQUIRE THAT A HABEAS PETITIONER BE GIVEN AT LEAST ONE OPPORTUNITY TO SHOW "CAUSE" AND "PREJUDICE" IN THE EVENT OF A PROCEDURAL DEFAULT?

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Appendix A

Court of Appeals' Decision Below: Harris v. Reed, 822 F.2d 684 (7th Cir. 1987)

Appendix B

Unpublished Opinion of the Illinois Appellate Court: People v. Harris, No. 81-871 Dated February 22, 1983.

Appendix C

Opinion of District Court Allowing Review On Merits of Petitioner's Claim: United States Ex Rel. Harris v. Reed, 608 F.Supp. 1369 (N.D. Ill. 1985)

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I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit holding that the Petitioner, Warren Lee Harris, waived his claim of ineffective assistance of counsel is reported at Harris v. Reed, 822 F.2d 684 (7th Cir. 1987). The contrary finding of District Court that the Petitioner did not waive his claim of ineffective assistance of counsel is reported at United States Ex Rel. Harris v. Reed, 608 F.Supp. 1369 (N.D. Ill. 1985). Copies of both these decisions are attached as Appendices A and C.

II. STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 2101(c). The Petitioner seeks review of the decision of the United States Court of Appeals issued on June 12, 1987. A Petition for Rehearing with Suggestion for Rehearing on Enbanc was timely filed on June 26, 1987. The Petition for Rehearing was denied on July 20, 1987. This Petition is filed within 90 days of the denial of the Petition for Rehearing.

III. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution:

In all criminal prosecutions an accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance Of Counsel for his defense. [emphasis added].

IV. STATEMENT OF THE CASE

A. The Trial of Warren Harris

In December 1977 the Petitioner, Warren Lee Harris ("Harris"), was tried in the Circuit Court of Cook County, Illinois for murder. A public defender was assigned to represent him. At trial, the public defender told the jury in her opening statement that there were two witnesses who saw another man flee the scene of the crime and that these two persons separately identified this man in a lineup as the person they saw running away from the shooting. (Petitioner's Exhibit 1, pp. 32-33)

The defense presented no witnesses and offered no evidence supporting the theory presented in the opening statement. The entire trial, from opening statements to closing argument, comprises only 130 pages of double-spaced transcript. (Petitioner's Exhibit 1, pages 25-154) Harris was convicted of murder and later sentenced to 50 to 100 years in prison.

B. Post Conviction Review in the State Courts

Harris' conviction was upheld on direct appeal against a challenge to the sufficiency of the evidence. Harris then filed a Petition for Post-Conviction Relief alleging ineffective assistance of trial counsel for, among other things, the public defender's failure to present the two witnesses who separately identified another man fleeing the scene. This issue had not been raised on direct appeal. The state trial court denied this Petition for Post Conviction Relief.

On appeal, the Illinois Appellate Court affirmed in an unpublished opinion (attached as Appendix B). This opinion first notes Harris' "procedural default" in failing to raise his ineffective assistance claim on direct appeal, (p. 5). Yet the opinion then also goes on to discuss and resolve the merits of this claim. (pp. 5-7)

C. Federal Habeas Review

Harris filed a pro se petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois claiming he had been denied effective assistance of counsel. The State moved to dismiss the petition on the grounds that Harris had failed to present the ineffective assistance claim on direct appeal and therefore had waived the claim. In a published opinion, the District Court found that the Illinois Appellate Court had excused the procedural default by addressing the merits of Harris' ineffective assistance claim. United States Ex Rel. Harris v. Reed, 608 F.Supp. 1369, 1376-78 (N.D. Ill. 1985) (attached as Appendix C).

Finding that the procedural default had been waived by the state court, the District Court then set the matter for trial on the merits of Harris' claim. The undersigned was then appointed to represent him. A three-day trial was held in November of 1985. The district court issued a 29-page Findings of Fact and Conclusions of Law and found that the case was "very close", but ultimately denied Harris' claim on the merits.

On appeal to the United States Court of Appeal for the Seventh Circuit, the State once again argued that as a threshold

matter, the district court erred in finding the state court waived Harris' procedural default. The majority of the panel agreed. The majority reviewed the unpublished opinion of the Illinois Appellate Court and found:

> [T]here is neither an explicit finding of waiver nor an express intention to ignore waiver. The order is ambiguous because the Court addressed the merits of some of the Petitioner's claims which he clearly implied had been waived.

822 F.2d at 687

The majority then attempted to ascertain the intent of the Illinois Appellate Court. It concluded that a "full reading of the order suggests to us that the Appellate Court intended to find all grounds waived except that pertaining to alibi witnesses". Ibid. at 687. Accordingly, the majority held it could not review the merits of Harris' ineffective assistance claim.

In a concurring opinion, Judge Cudahy disagreed with the majority's treatment of the waiver issue as follows:

> As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived, the Illinois court considered the claim on the merits. Rather than attempting to divine the unspoken "intent" of the [Illinois Appellate Court], I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is essentially a technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the State Court's power to protect their procedural requirements merely by expressing findings that a petitioner has waived.

Id. at 687. [Emphasis added] Judge Cudahy went on to find that though the matter was "very close", he agreed with the district court on the merits. Id.

V. ARGUMENT - REASONS FOR ALLOWING THE WRIT

A. There Is a Conflict Among The Circuits As To When To Allow Habeas Review Where A State Court Opinion Has Discussed Both A Procedural Default And The Merits

1. The Fifth and Tenth Circuits Look to Whether the Procedural Default Was "Relied on Exclusively"; In Contrast, The Third and Seventh Look Only To Whether the Procedural Default was an "Alternate Ground"

In Strickland v. Washington, 466, U.S. 668 (1984) this Court restated the well-established principle that the "right to counsel is the right to effective assistance of counsel." 466 U.S. at 686. Here, where the petitioner's public defender told the jury in opening statement of two witnesses who separately identified another man fleeing the scene but then presented no evidence, there is an obvious question as to whether the petitioner was denied this fundamental constitutional right.

In Wainwright v. Sykes, 433 U.S. 72, 81-83 (1977) this Court held that where there is "an adequate state ground", that is, a procedural default under state law, then a federal court should decline to consider a habeas petitioner's claim. This rule is not jurisdictional, but is grounded on considerations of comity with state courts and the promotion of finality. See Reed v. Ross, 468 U.S. 1, 10 (1984) Thus, if the state court does not rely upon or waives a procedural default and goes on to reach the merits, then a federal court may properly review the merits without offending the principles underlying Sykes, since the court has not applied the procedural default and has itself considered the merits. See County of Ulster v. Allen, 442 U.S. 140, 154 (1979)

At issue here is the situation where a state court affirms a conviction, and in so doing, addresses both the procedural default and the merits. The Fifth and the Tenth Circuits take one approach, namely, that if the state court does not rely "exclusively" on the procedural default, then habeas review is proper. In other words, if the state court reaches the merits, then so can the federal habeas court. The Third and the Seventh Circuits hold quite the contrary; where the state court addresses both the procedural default and the merits, then so long as the default was an alternate ground, habeas review should be denied.

The Fifth and Tenth Circuits' position is exemplified in Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981) In Thompson the Fifth Circuit found that the state court had addressed both a procedural default and the merits, but, "[b]ecause the state courts have not relied exclusively upon [the petitioner's] procedural default, Wainwright v. Sykes does not prevent federal habeas review". 642 F.2d at 998. [Emphasis added] Hence, when the state court addresses the merits, the door is opened to habeas review even if the procedural default has also been addressed.

This "exclusive reliance" rule of Thompson has most recently been followed by the Tenth Circuit in Braiser v. Douglas, 815 F.2d 64 (10th Cir. 1987). In Braiser, as in this case, the state appellate court relied upon both the petitioner's procedural default and the merits in denying post-conviction relief. Following Thompson, the Tenth Circuit held that federal habeas review of the petitioner's claim was proper:

> We conclude that since the state court reviewed petitioner's claims on the merits, the procedural de-

fault did not preclude the federal habeas court from addressing the claims on the merits. See Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981) (When "the state courts have not relied exclusively upon [petitioner's] procedural default, Wainwright v. Sykes does not prevent federal habeas review."

815 F.2d at 65.

This "exclusive reliance" rule has not been universally accepted. In fact, the Third Circuit has expressly rejected the Thompson decision. In Caruso v. Zelinsky, 689 F.2d 435, 439-40 (3rd Cir. 1982) the court reviewed three different approaches other circuits have taken when a state court addresses both a procedural default and the merits, including the Thompson decision. The court then held that exclusive reliance on the procedural default was not necessary to prevent habeas review; it need only be an "alternative holding":

> Because we believe that the policies that justify deference to a valid state procedural rule at all are equally applicable whenever the state court actually relies on a procedural bar, we conclude that state court reliance on a procedural rule as an alternate holding suffices to implicate the procedural default doctrine.

689 F.2d at 440. [Emphasis added]

The Seventh Circuit follows this rule that the procedural default need only be an "alternate holding" in order to preclude habeas review. In this case, it relied upon the rule in order to bar review of the merits of petitioner's ineffective assistance claim:

> The [state appellate] court then proceeded, as an alternate holding, to reject Harris' claim on its merits. Under these circumstances, we find that the order was closer to that in Farmer, when the state court relied on the alternate grounds for its findings.

822 F.2d at 687.

2. Where the State Court Is Unclear as to Whether It Excused a Procedural Default, There Is A Further Split of Authority as to How That Ambiguity Should Be Resolved

Not only is there a conflict among circuits as to whether the procedural default need be relied on "exclusively", there is also a split among the circuits as to how to treat a state court opinion which is ambiguous as to whether it "waived" the procedural default.

In this case, the majority opinion has taken the position that it is entitled to discern what the ambiguous state court opinion meant, in particular, whether or not the opinion "suggests" that the procedural default was waived or excused. 822 F.2d at 687. Such an attempt to second-guess the intent of the state court in order to determine whether to allow habeas review is wholly at odds with the precedent of this Court and other circuits.

This Court has long held that "courts indulge every reasonable presumption against the waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) See also Brewer v. Williams, 430 U.S. 387, 440 (1977); Brookhart v. Janis, 384 U.S. 1, 4 (1966).

So too, other circuits have employed a presumption against waiver of constitutional claims when raised in a habeas petition. In Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983) the court considered whether the habeas petitioner's claim was preserved in an

ambiguous state court opinion and presumed that the state court reached the merits:

> In the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits....
>
> Otherwise, federal habeas review would unjustly be denied a prisoner who had no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Issacs [Engle v. Issac, 456 U.S. 107(1982)], for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

686 F.2d at 314, and n. 4.

Similarly, the Second Circuit in Rosenfeld v. Durham, 820 F.2d 52 (2nd Cir. 1987), reversed the district court for presuming that the state court opinion was based on a procedural default:

> [The] district court was not entitled to assume that the state court's decision rested on a procedural default. In fact, that court's language -- "they do not merit", while ambiguous, suggests that it went beyond the petitioner's procedural default and considered the merits of his claim.

820 F.2d at 55. Judge Cudahy set forth the same principle in his concurring opinion here: "Rather than attempting to divine the unspoken intent of the [Illinois Appellate] Court, I think we should invoke a presumption that waiver not clearly found has been condoned." 822 F.2d at 687.

The conflicts described above affect not just Warren Harris, but every habeas petitioner in the nation. State court opinions which affirm convictions with discussions of both a procedural default and the merits are common. How a federal

habeas court treats such dual-based decisions requires a uniform standard. Yet, such uniformity is plainly lacking under the current state of the law. Whether the merits of a petitioner's constitutional claim will ever be reviewed by federal habeas court should not hinge on whether he happens to be imprisoned in Illinois versus Oklahoma. Only this Court can ensure that a habeas petitioner's procedural default will be given equal treatment.

B. A Habeas Petitioner Has A Right To A Hearing On "Cause And Prejudice" Under Sykes And Such A Right Was Denied Here

Even if the state court declares a procedural default as the exclusive and unequivocal basis for its decision, Sykes still allows federal habeas review if the petitioner can show "cause" and "prejudice". 433 U.S. at 90-91. Yet here, Warren Harris never had an opportunity to prove either "cause" or "prejudice".

Warren Harris has an eighth grade education. (Tr. November 14, 1985 at 59) After filing his handwritten pro se petition, the district court found that the state court had waived any procedural default. Hence, there was no further need to show "cause" and "prejudice" and the district court proceeded with a three day trial on the merits. Now, the majority below has found the procedural default was not excused. But Harris still has never had an opportunity to show "cause" or "prejudice" for any procedural default. Harris' chance to prove the cause and prejudice exception to Sykes has simply fallen through the cracks.

The "cause and prejudice" exception is part and parcel of the protection of constitutional rights built into the principles of Sykes. Thus, a habeas petitioner must be allowed at least

one opportunity to show cause and prejudice somewhere along the way. Otherwise, the cause and prejudice exception to Sykes can be rendered meaningless, when, as in this case, a court of appeals later disagrees with the district court as to whether the procedural default was excused.

The right to a hearing on cause and prejudice is well-illustrated in Preston v. Maggio, 705 F.2d 113 (5th Cir. 1983). In Preston the court found that the state court had in fact rejected the habeas petitioner's claim on a procedural ground and therefore federal habeas review was barred unless cause and prejudice could be shown. After finding that the petitioner had not been given an adequate opportunity to show cause, the Fifth Circuit vacated and remanded the case to the district court for a hearing on cause and prejudice. 705 F. 2d at 117.

Here the decision below completely ignores the cause and prejudice exception; other than a passing reference in a footnote that Harris' counsel in the state appellate court was different from his trial counsel (822 F.2d at 686, n.1), the words "cause" and "prejudice" are not even mentioned in the majority's opinion. Such a result is wholly at odds with the principles underlying Sykes, not to mention the express holding of the Fifth Circuit in Preston.

Accordingly, the majority's opinion should, at the very least, be reversed and remanded to allow Warren Harris his one opportunity to show cause and prejudice. Yet considering Warren Harris filed his habeas petition seven years ago and that a three day trial has already been held on the merits, it would be a far

better use of judicial resources for this case to be remanded for a consideration of the merits to the Court of Appeals. See, e.g. Granberry v. Greer, ___ U.S. ___, 107 S.Ct. 1671, 1673-76 (1987) (It is appropriate to address merits of habeas claim even though state remedies not exhausted where called for by the interests of justice.)

VI. CONCLUSION

The petitioner, Warren Lee Harris, respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WARREN LEE HARRIS

By: Kimball R. Anderson
One of His Attorneys

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Grand Trunk filed a reply and sur-reply. The court granted summary judgment to Mulay on September 30, 1983.

Grand Trunk moved to vacate the summary judgment on February 17, 1984, relying principally on the deposition of NATCO's service manager, which was taken after the grant of summary judgment. In the deposition, the NATCO service manager testified that the locator dowels may have been missing from the machine when it entered Grand Trunk's control; this information provided the basis of a defense against Carmack Amendment liability.

The trial court concluded that Grand Trunk had breached "an affirmative duty to file material in opposing ... summary judgment," justifying denial of reconsideration. *Mulay Plastics, Inc. v. Grand Trunk Western Railroad Co.*, 102 F.R.D. 130, 131–32 (N.D.Ill.) (quoting *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 167 (7th Cir.1984)), *app. dism'd*, 742 F.2d 369 (7th Cir.1984), *cert. denied*, 470 U.S. 1037, 105 S.Ct. 1409, 84 L.Ed.2d 798 (1985). The court held that Grand Trunk had unreasonably, if not deliberately, failed to advance the defense earlier. Grand Trunk had notice of the basis of the defense prior even to the filing of the complaint because the NATCO service manager had suggested to Grand Trunk's damage prevention officer that the dowels might be missing and searched for the dowels with him.

But because Grand Trunk's lapse was not willful, the court did not apply the harsh sanction of refusing reconsideration. The court, invoking its equitable powers, decided for "striking a middle ground" and vacated the ruling conditioned on Grand Trunk's payment of Mulay's attorney's fees in handling the motion. The court drew an analogy to Rule 60, which permits relief from a final judgment to be granted "upon such terms as are just." The court also likened its ruling to granting voluntary dismissal under Rule 41(a)(2) upon "such terms and conditions as the court deems proper." The court drew its authority from the statement in *Hall v. Cole*, 412 U.S. 1, 4–5, 93 S.Ct. 1943, 1945–46, 36 L.Ed.2d 702 (1973), that "federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."

The trial court could have denied reconsideration of the order granting summary judgment. Grand Trunk also had the option of not paying the fees and letting the judgment stand, an option that it understandably did not find attractive. Thus, the granting of fees here actually benefited Grand Trunk. Having so benefited below, Grand Trunk cannot further improve its position here.

V

For the reasons stated above, the judgment of the district court is

AFFIRMED.

KEY NUMBER SYSTEM

Warren Lee HARRIS, Petitioner-Appellant,

v.

Marvin REED, et al., Respondents-Appellees.

No. 86–2032.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 9, 1987.

Decided June 12, 1987.

Rehearing and Rehearing En Banc Denied July 20, 1987.

Petitioner, who was convicted of murder, brought both state and federal petitions for writ of habeas corpus, on basis of claim of ineffective assistance of trial counsel, though such claim was not presented on direct appeal. The United States District Court for the Northern District of Illinois, Eastern Division, Susan Getzendanner, J., dismissed petition on its merits, and petitioner appealed. The Court of Appeals,

Bauer, Chief Judge, held that: (1) issue which precludes state appellate court from addressing merits of claim also precludes federal court, on habeas corpus petition, from addressing merits of claim, but if state court ignores procedural default and addresses claim on merits, federal court is not precluded from reaching merits of claim in petition for habeas corpus relief, and (2) Court of Appeals could not review merits of petitioner's ineffective assistance of counsel claim, where state court did not intend to ignore petitioner's procedural default in failing to raise claim during direct appeal.

Affirmed.

Cudahy, Circuit Judge, filed concurring opinion.

1. Criminal Law ⇐998(3)

Failure to raise issue that could have been raised on direct appeal waives issue for purposes of postconviction relief.

2. Habeas Corpus ⇐45.3(1.30, 1.50)

Issue which precludes state appellate court from addressing merits of claim, also precludes federal court, on habeas corpus petition, from addressing merits; if, however, state court ignores procedural default and addresses claim on its merits, federal court is not precluded from reaching merits of claim in petition for habeas corpus relief.

3. Habeas Corpus ⇐45.3(1.40)

Federal Court of Appeals was precluded from reviewing merits of petitioner's ineffective assistance of counsel claim in his petition for habeas corpus, where state court did not ignore petitioner's procedural default in failing to raise claim on direct appeal, as full reading of state court's order suggested that appellate court intended to find all grounds waived except that pertaining to alibi witnesses, but then proceeded, as alternative holding, to reject petitioner's claim on its merits.

E. King Poor, Winston & Strawn, Chicago, Ill., for petitioner-appellant.

Jack Donatelli, Asst. Atty. Gen., Chicago, Ill., for respondents-appellees.

Before BAUER, Chief Judge, CUDAHY, and POSNER, Circuit Judges.

BAUER, Chief Judge.

Warren Lee Harris was convicted of murder in 1977 and received an indeterminate sentence of 50–100 years in prison. His conviction was upheld on appeal against a challenge to the sufficiency of the evidence. Harris filed both state and federal petitions for post-conviction relief. In his state petition for post-conviction relief, Harris alleged ineffective assistance of trial counsel. This issue had not been raised on direct appeal. Harris' state petition for post-conviction relief was denied. The Illinois Appellate Court affirmed the dismissal of Harris' petition, although it is unclear whether the dismissal was based on waiver or the weakness of Harris' claim on the merits.

In his federal petition for a writ of habeas corpus in the United States District Court, Harris again claimed ineffective assistance of trial counsel. Although the state urged that Harris' failure to present the claim on direct appeal precluded the federal court from addressing the claim, the court found that the state appellate court had excused the procedural default by addressing the merits in denying Harris' petition for post-conviction relief. *United States ex rel. Harris v. Reed*, 608 F.Supp. 1369 (N.D.Ill.1985). The district court then dismissed Harris' claim on its merits. We affirm the dismissal of Harris' petition without reaching its merits, since we conclude that the state court did not excuse the procedural default at issue.

I.

Harris was convicted of shooting Ernest "Pete" Howard on the west side of Chicago in 1977. Howard died before identifying his assailants. Harris was connected to the crime by the testimony of Antonio Slater who was driving down the block near the site of the murder. Slater testified that he heard a shot, saw Harris jump into

a car and drive away past him. At trial, Harris was represented by Assistant Public Defenders Todd Musberger and Kathryn Kuhlen. In the opening statement, the defense promised to show that two witnesses had identified a man named McWhorter leaving the scene of the crime. In fact, Alice Riles and LeRoy Carter had given statements to that effect to the police and were present, in the courtroom, prepared to testify for the defense. In the end, however, the defense presented no witnesses, resting on the belief that the state had not proven its case against Harris beyond a reasonable doubt.

Harris did not claim ineffective assistance of counsel in his direct appeal.[1] In denying the petition for post-conviction relief, the state court noted that an issue is waived for purposes of post-conviction relief if it could have been raised on direct appeal. Typically, a claim of ineffective assistance of counsel cannot be raised on direct appeal because its resolution often requires evidence which is not contained in the record on appeal. Here, however, the state court found that all of the grounds presented to support the claim of ineffective assistance of counsel were sufficiently supported by the record to have been raised on direct appeal—with the exception of the ground alleging counsels' failure to investigate and present alibi witnesses. After noting this, the court proceeded to reach and reject some of Harris' claims on the merits—claims which he could have raised on direct appeal. The United States District Court held a three-day hearing to examine Harris' claim of ineffective assistance of counsel in his petition for habeas corpus relief and determined that Harris' claim should be rejected on its merits.

II.

[1, 2] The state urges us to find that the district court erred in ruling that Harris had not waived his right to present his claim of ineffective assistance of trial counsel by failing to raise the issue on direct appeal. Failure to raise an issue that could have been raised on direct appeal waives the issue for the purposes of post-conviction review. *People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist.1979). An issue which precludes a state appellate court from addressing the merits of a claim, also precludes a federal court, on a habeas corpus petition, from addressing the merits of the claim. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir.1983). If, however, the state court ignores the procedural default and addresses the claim on its merits, a federal court is not precluded from reaching the merits of the claim in a petition for habeas corpus relief. *United States ex rel. Williams v. Franzen*, 687 F.2d 944 (7th Cir.1982).

As here, the defendant in *Williams* failed to present a claim on direct appeal, first asserting it in a state petition for post-conviction relief. Without addressing waiver, the state court reached the merits of Williams' claim. On habeas review, the district court noted:

> The policies underlying deference to a state procedural default are inapplicable where the state itself does not apply or enforce the rule. When a state court does not rely on a waiver of a constitutional claim, but goes beyond the alleged waiver to rule on the merits, a federal court can also reach the merits of the claim without the cause-prejudice standard of *Wainwright v. Sykes* being met.

Id. at 951. Thus, a state court's complete failure to note waiver allows a federal court to review the merits of a claim. In *Farmer v. Prast*, 721 F.2d 602 (7th Cir. 1983), we addressed the effect of a state court decision which relied both on a procedural default and on the weakness of the appellant's claim on the merits. There we determined that when a state court relies both on waiver and a rejection of the claim on the merits—a federal court will respect the alternate *res judicata* ground of the

1. It appears that Harris was represented on appeal by counsel from the State Appellate Defenders Office and was no longer represented by Assistant Public Defenders, thus making it more difficult to show cause for the failure to raise the issue on direct appeal.

order and will be precluded from reaching the merits of the claim. *See also Phillips v. Lane*, 787 F.2d 208, 211 (7th Cir.1986).

The state appellate court order at issue here is distinguishable from the orders in both *Williams* and *Farmer*. In *Williams*, the court completely ignored waiver, while in *Farmer*, the court expressly relied, in part, on waiver. The state court here did neither. In examining Harris' post-conviction petition, the state court noted that failure to present an issue on direct appeal precludes post-conviction review unless the nature of the issue is such that it could not have been raised on direct appeal. The district court then examined the trial court record and found that all grounds, save that relating to the alibi witnesses, could have been presented on direct appeal. Without expressly finding that all other grounds were waived, the court then proceeded to a short discussion of general standards for judging a claim of ineffective counsel. Next, the court analyzed both trial counsel's failure to call alibi witnesses, as well as other grounds that could have been raised on direct appeal and concluded that Harris had received the effective assistance of his trial counsel.

The district court found the state court order analogous to that in *People v. Ross*, 63 Ill.App.3d 884, 20 Ill.Dec. 688, 380 N.E.2d 897 (1st Dist.1978), in which the Illinois Appellate Court noted a waiver problem but decided to examine the case on its merits. In *Ross*, however, the court explicitly stated its determination to ignore the procedural default. Here, we have no such clear expression of intent. There is neither an explicit finding of waiver nor an expression of an intention to ignore waiver. The order is ambiguous because the court addressed the merits of some of the petitioner's claims which it clearly implied had been waived.

[3] While we do not require an explicit finding of waiver nor an explicit statement of intention to ignore waiver, it is clearly more helpful to include such language. In considering whether a state court chose to condone a procedural default, a reviewing court should try to assess the state court's intention to the extent that this is possible. Upon review of the state court order, we find we must disagree with the district court in this regard. A full reading of the order suggests to us that the appellate court intended to find all grounds waived except that pertaining to the alibi witnesses. The court then proceeded, as an alternate holding, to reject Harris' claim on its merits. Under these circumstances, we find that the order was closer to that in *Farmer*, where the state court relied on alternate grounds for its finding. We cannot find that the state court intended to ignore the procedural default. Accordingly, we are precluded from reviewing the argument raised in the petition, and the order dismissing the habeas corpus petition is

AFFIRMED.

CUDAHY, Circuit Judge, concurring:

I write separately only to indicate my view that the ineffective assistance of counsel claim should not be treated as waived. As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived. The Illinois court considered the claim on its merits. Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the state courts' power to protect their procedural requirements merely by making express findings that a petitioner has waived.

Judge Getzendanner struggled with the important and difficult issues here and, after a hearing lasting three days, denied the petition. Although the matter is very close, I would support her determination and thereby reach the same result as the majority but by a different route.

WEST KEY NUMBER SYSTEM

a Petition for Rehearing or ... the same.

Jordan 28th floor.

Affirmed 2-22-83

1st Division
February 22, 1983

81-871

Check app. of opinion

78-1193

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

83-123

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	
WARREN HARRIS, Defendant-Appellant.	)	Honorable Arthur J. Cieslik, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Defendant, Warren Harris, appeals from an order granting the State's motion to dismiss his petition for post-conviction relief, contending that he was improperly denied an evidentiary hearing.

The record shows that defendant was tried before a jury, convicted of murder, and then sentenced to serve 50 to 100 years in the penitentiary. That judgment was affirmed on direct appeal pursuant to Supreme Court Rule 23. People v. Harris (1979), 71 Ill. App. 3d 1113.

The facts set forth in the order affirming his conviction reveal that defendant fatally shot Earnest Howard about 10 p.m. on July 9, 1977. The chief prosecution witness was Antonio Slater who testified that he was driving on Christiana Avenue in Chicago that evening when a

81-871

parked car blocked his path. He heard a gunshot and saw two men standing on the sidewalk in front of the parked car. The man facing Slater began to fall and defendant pushed him away, turned and ran back to the car. As he reached the passenger door, the beam of one of Slater's headlights shone on defendant above the waist. Defendant then drew a gun and pointed it at Slater, causing Slater to crouch down in his car. Defendant entered the parked car and was driven away. Slater also drove off but did not report his presence to the police for about six weeks. He indicated that he knew defendant because he had seen him several times in a pool hall and was able to see his face after the shooting.

At trial, defendant was represented by an assistant public defender. During cross-examination of Slater, he attempted to impeach Slater by showing the discrepancies between his signed statement and his testimony at a preliminary hearing, by showing inconsistencies in his trial testimony, and raising questions about where he had previously seen the defendant.

In his direct appeal defendant was represented by the office of the State Appellate Defender, and the sole issue presented for review was whether defendant had been proved guilty beyond a reasonable doubt. When this issue was resolved against him, defendant filed a pro se petition for post-conviction relief. (Ill. Rev. Stat. 1979, ch. 38, pars. 122-1 et seq.) Private counsel was appointed to represent him on the petition and an amended petition was prepared and filed.

In that petition defendant alleged that he was denied his right to the effective assistance of counsel in that his trial counsel failed

to properly prepare for trial because he did not interview or call two witnesses who saw two men running from the scene; Melvin McWhorter was identified as one of these men. Defendant also alleged that his trial counsel failed to call George Williams as a witness to testify that he was the man with McWhorter on the night of the shooting; that counsel failed to seek disclosure of the identity of the informant who provided police with the name of the State's only identification witness five weeks after the shooting; that counsel failed to call a rebuttal witness to impeach Slater's testimony that he voluntarily went to the police; that counsel failed to offer into evidence a stipulation that would have perfected the impeachment of Slater on the issue of his turning onto Christiana from 16th Street; that counsel failed to investigate and seriously consider defendant's potentially viable alibi defense, or contact alibi witnesses; and that counsel failed to inform defendant that no evidence or alibi would be offered in his defense until the morning on which the defense was to go forward and then ignored defendant's objection to this procedure.

Attached to the petition was the affidavit of Melvin McWhorter who stated that he was acquainted with the deceased and bought narcotics from him and that he was present when he was shot by George Williams. He also averred that he is acquainted with Slater, whom he knew to be a drug addict, and that he was not present in the area on the night deceased was killed.

The affidavits of Jewel, Mary and Genise Conner, friends of the defendant, were also attached in which they averred that defendant was

sick in bed on the day of the shooting in the home of Jewel Conner. Jewel also stated that she notified defense counsel of this potential alibi defense and that she was available to testify as a witness but was never contacted.

The defendant also attached the answer to discovery filed by his trial attorney and various police reports which were also filed in conjunction with the incident. These reflected interviews with two persons who identified McWhorter as one of two men seen fleeing from the incident, an interview with McWhorter in which he denied any knowledge of the shooting, and an interview with Williams.

The State filed a motion to dismiss alleging, inter alia, that the doctrines of res judicata and waiver were applicable in light of the affirmance of the judgment on direct appeal. The defendant's petition was dismissed without an evidentiary hearing and this appeal followed. Defendant now maintains that an evidentiary hearing should have been held to determine the merits of his allegation of incompetence of counsel or, in the alternative, that the State should have been required to file an answer. The State initially responds that defendant has waived his right to assert a claim of the incompetence of his trial counsel because he failed to raise this issue in his direct appeal.

It is well settled that where a direct appeal is taken from a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those which could have been presented, but were not, are considered waived. (People v. French (1970), 46 Ill. 2d 104, 262 N.E.2d 901.) Where, however, the allegations in a post-conviction petition are based on facts which do not appear in the record,

they are not barred by the doctrine of res judicata. People v. Edmonds (1979), 79 Ill. App. 3d 33, 398 N.E.2d 230.

In the instant case, defendant alleges incompetence because his trial counsel failed to investigate or call several witnesses on his behalf, to perfect impeachment of the State's chief witness, or to investigate and present an alibi defense. Our examination of the record in this appeal indicates that, except for the alibi witnesses, the identity of the persons set forth by the defendant and their statements to the police were of record, and it also appears that the stipulation alluded to by defendant was contained in the trial record. As such, these matters could have been raised in defendant's direct appeal. (See People v. Churchill (1981), 92 Ill. App. 3d 1006, 416 N.E.2d 395.) In this regard we find it noteworthy that defendant's appellate counsel was not affiliated in any way with his trial counsel, and there is also no indication that defendant expressed any dissatisfaction with his trial counsel at the time the appeal was filed or raised any question regarding the competency of his trial counsel. See People v. Stewart (1978), 66 Ill. App. 3d 342, 383 N.E.2d 1179.

Competency is determined from the totality of counsel's conduct at trial. (People v. Murphy (1978), 72 Ill. 2d 421, 381 N.E.2d 677.) In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney, and that this incompetence produced substantial prejudice to him without which the result of the trial

would probably have been different. People v. Talley (1981), 97 Ill. App. 3d 439, 422 N.E.2d 1084.

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present the alibi witnesses and to present an alibi defense. The affidavits show that the Conners made themselves available to defense counsel but were never called as witnesses to testify as to defendant's whereabouts at the time of the shooting.

The determination of whether or not to call a witness is generally regarded as a matter of trial strategy, and, even if it were error on the part of trial counsel not to introduce this testimony, errors in strategy and judgment on the part of counsel do not render the representation incompetent. People v. Pendleton (1982), 104 Ill. App. 3d 1104, 433 N.E.2d 1076, and cases cited therein.

It appears on this record that counsel's strategy was to rely on the State's inability to prove the defendant guilty beyond a reasonable doubt as indicated in his answer to discovery. The facts gleaned from the order affirming defendant's conviction indicate that counsel decided to emphasize the discrepancies in the testimony of the State's only eyewitness. To this end he vigorously cross-examined Slater in an attempt to impeach his testimony and point out the inconsistencies in his statements. The fact that an attorney in the better light of hindsight might have handled the trial in a different manner is not an indication of trial counsel's incompetence. People v. Elder (1979), 73 Ill. App. 3d 192, 391 N.E.2d 403; see also People v. Martinez (1982), 104 Ill. App. 3d 990, 433 N.E.2d 981.

Before an evidentiary hearing is required in a post-conviction proceeding, a petitioner must make a substantial showing of a violation of a constitutional right (People v. Farnsley (1973), 53 Ill. 2d 537, 293 N.E.2d 600), and a reviewing court will not reverse the determination of the trial court in that regard unless it was manifestly erroneous (People v. Murphy (1979), 78 Ill. App. 3d 132, 397 N.E.2d 68).

Viewing defendant's petition and supporting affidavits in light of the record, we do not believe that he has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court.

Dated at Chicago, Illinois, this 22nd day of February, 1983.

BUCKLEY, P.J., McGLOON and GOLDBERG, JJ.

memorandum of law. Defendants may file opposing affidavits and a memorandum of law. The matter will be determined on those submissions unless something additional is required. Plaintiffs' submission should be filed within three weeks from the date of the order to be entered herein. Defendants' opposition papers should be filed one week later.

In sum plaintiffs are granted judgment against Telewide for breach of contract and breach of warranty in the sum of $4,262,021.75. Plaintiffs are granted judgment jointly and severally against Telewide and Schubert for fraud and fraudulent representation and fraudulent breach of warranty in the sum of $4,262,021.75. On each of these judgments plaintiffs are entitled to recover prejudgment interest from May 20, 1980. Plaintiffs are granted punitive damages assessed jointly and severally against Schubert and Telewide in the sum of $500,000. Finally, plaintiffs are entitled to an award of attorney's fees to be assessed against defendants and their counsel. Plaintiffs are to recover their costs.

Plaintiffs should submit an order and judgment for the court's signature on notice to defendants, and defendants may submit a counter order.

IT IS SO ORDERED.

UNITED STATES of America ex rel. Warren Lee HARRIS, Petitioner,

v.

Marvin REED, Respondent.

No. 80 C 513.

United States District Court, N.D. Illinois, E.D.

April 8, 1985.

On petition for writ of habeas corpus, respondent moved for summary judgment. The District Court, Getzendanner, J., held that: (1) Illinois' delay in disposing of petitioner's postconviction petition was not so egregious as to justify issuance of writ for violation of petitioner's federal due process rights; (2) evidentiary hearing was required on issue of whether petitioner was denied effective assistance of counsel at his state trial; (3) habeas court was barred from considering merits of claim of newly discovered evidence; and (4) evidence was sufficient to support conviction.

Motion granted in part and denied in part.

1. **Habeas Corpus ⇐45.3(9)**

Where petitioner had exhausted his state appellate and postconviction remedies, claim that petitioner was unduly prejudiced and should be excused from exhaustion requirement because of inordinate delay in disposition of state postconviction relief petition was moot.

2. **Habeas Corpus ⇐45.3(7)**

Inordinate delays in state procedures, such as posttrial motions, appeals, and postconviction remedies, may excuse exhaustion where exhaustion is not considered a jurisdictional requirement.

3. **Habeas Corpus ⇐45.3(1.50)**

Remedy for inordinate delay in state procedures is normally immediate consideration by federal court of habeas petitioner's federal claims, an effective waiver of exhaustion requirement.

4. **Habeas Corpus ⇐45.3(7)**

Petitioner suffered no prejudice from Illinois' delay in disposing of his postconviction petition, as might violate his right to full and fair consideration of his federal habeas claims in federal court, where testimony of alibi witness who had died would have been cumulative and petitioner did not claim that three alibi witnesses who had moved out of state were inaccessible.

5. Constitutional Law ⇐270.5
Habeas Corpus ⇐45.3(7)

Illinois' delay in disposing of petitioner's postconviction petition, apparently the result of misplacement of petitioner's postconviction petition, could not have violated petitioner's federal due process rights, and seven and one-half month delay was not so egregious that, absent prejudice, it could justify issuance of writ of habeas corpus. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐998(3)

Under Illinois law, failure to raise on appeal the issue of ineffective assistance of trial counsel results in waiver of that issue for postconviction review; there is an exception where basis for claim is not found in the record.

7. Habeas Corpus ⇐45.3(1.30)

Waiver of right to present issue to federal courts on collateral review may be overcome only by showing of cause and resulting prejudice; cause and prejudice are flexible concepts, satisfaction of which changes with circumstances of particular petitioner.

8. Habeas Corpus ⇐45.3(1.30)

"Waiver" of right to present issue to federal courts on collateral review, if not cured by satisfaction of cause and prejudice, may be ignored under circumstances constituting miscarriage of justice.

9. Habeas Corpus ⇐45.3(1.30, 1.50)

Where state court ignores procedural default and reviews substantive merits of what would otherwise be a waived issue, federal courts must review merits of that issue in petition for habeas corpus; but where state court has clearly reached both merits of waiver question and substantive merits of improperly raised issue, federal collateral review is barred, absent showing of cause and prejudice.

10. Habeas Corpus ⇐45.3(1.40)

Petitioner's ineffective assistance of counsel claim could be presented to federal court with respect to all omissions raised in amended postconviction petition, where Illinois state court, in its denial of petitioner's postconviction appeal, simply noted that waiver appeared to operate, but then continued to treat merits of improperly raised issue.

11. Criminal Law ⇐641.13(1)

Convicted defendant, to prevail on ineffective assistance of counsel claim, must demonstrate that counsel's representation fell below objective standard of reasonableness, and that error had an effect on judgment. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(1)

When examining counsel's performance, court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance that might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(1)

Defense attorney's discretion is broad, and so-called "trial strategy" may excuse omissions that otherwise would appear inexcusable. U.S.C.A. Const.Amend. 6.

14. Habeas Corpus ⇐90.2(3)

Evidentiary hearing was required on issue of whether petitioner was denied effective assistance of counsel at his state trial, where petitioner may have been prejudiced, and rendered ineffective assistance, by counsel's failure to interview and call numerous witnesses, which conduct would fall below standard of reasonably competent representation. U.S.C.A. Const. Amend. 6.

15. Habeas Corpus ⇐90.2(3)

Evidentiary hearing is appropriate when facts are in dispute and petitioner was not afforded full and fair hearing on ineffective assistance issue in state system. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐938(1)

Under Illinois law, in order to obtain new trial based on newly discovered evidence, defendant must show that evidence could not have been produced at trial by use of reasonable diligence, that evidence is noncumulative, and that evidence is of such

conclusive character that it would probably change result.

17. Criminal Law ⇐905

Motions for new trial are subject to close scrutiny.

18. Criminal Law ⇐958(1)

Newly discovered evidence must be presented to trial court in motion for new trial.

19. Criminal Law ⇐951(1)

Exceptions to Illinois' requirement that motions for new trial be brought within 30 days following entry of finding or return of verdict are narrow.

20. Habeas Corpus ⇐45.3(1.40)

Habeas court was barred from considering merits of claim of newly discovered evidence, where petitioner failed to make this claim before both postconviction and direct appeal lower and appellate courts. Ill.S.H.A. ch. 38, ¶¶ 116–1, 116–1(b).

21. Habeas Corpus ⇐92(1)

Federal court will not review merits of state court's denial of new trial motion solely under state standards for granting of new trial.

22. Habeas Corpus ⇐90.2(1)

Where newly discovered evidence is alleged in habeas application, evidence which could not reasonably have been presented to state trier of facts, federal court must grant evidentiary hearing; such evidence must bear upon constitutionality of petitioner's detention, and mere existence of newly discovered evidence relevant to guilt of state prisoner is not ground for relief on federal habeas corpus.

23. Criminal Law ⇐938(1)

Newly discovered evidence, namely, affidavit absolving petitioner of shooting, would not have entitled petitioner to new trial under Illinois law where petitioner failed to offer justifiable reason for not presenting this evidence at trial and affiant's testimony lacked credibility.

24. Criminal Law ⇐1144.13(3, 5), 1159.2(7)

In determining whether federal convictions are supported by constitutionally sufficient evidence, "reasonable doubt" test is applied, and this test is satisfied when reviewing court finds that, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond reasonable doubt; in applying this test, reviewing court must assume that jury drew all reasonable inferences in prosecution's favor. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

25. Homicide ⇐250

Murder conviction was supported by sufficient evidence, including eyewitness testimony.

Warren Lee Harris, pro se.

Jack Donatelli, Asst. Atty. Gen., Chicago, Ill., for respondent.

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This action is before the court on the petition for a writ of habeas corpus, 28 U.S.C. § 2254, of Warren Lee Harris. The parties have briefed respondent's motion for summary judgment. Moreover, the parties have provided the court with additional materials from the state court record. For the reasons stated below, respondent's motion for summary judgment is granted in part and denied in part. An evidentiary hearing is required to determine the merits of the one outstanding claim. The court therefore will appoint an attorney to aid Harris in this evidentiary hearing.

Factual Discussion

On December 21, 1977, after a three-day jury trial, Harris was found guilty of murder on the testimony of the state's one occurrence witness, Antonio Slater. Ac-

cording to Slater, Harris shot and killed one Earnest Howard on the night of July 9, 1977, near the area of 16th and Christiana streets in Chicago, Illinois. On February 2, 1978, Harris was sentenced to serve 50 to 100 years in the state penitentiary.

At trial, Public Defenders Todd Musberger and Kathy Kuhlen represented Harris. In her opening statement on December 19, 1977, Kuhlen made the following remarks:

> At this time, I would like to mention [one] of the names that Mr. Fuenty [prosecutor] brought up and also another name that he didn't mention that I think will figure quite prominently in this trial, that other name is Melvin McWhorter, also known as Buster on the street.
>
> To understand the importance of Mr. McWhorter and of Antonio Slater, it is necessary to give you a brief review of the police investigation in this case. During the days immediately following the shooting of Earnest Howard the police talked to a number of people who were present in the area of 16th and Christiana, people who lived there and also to relatives of Earnest Howard. They learned that Earnest Howard was a narcotics dealer who sold in that neighborhood at 16th and Christiana.
>
> . . . . . .
>
> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.
>
> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that . . . he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Trial Transcript 31–33.) Kuhlen continued, discussing how Slater's statement to the police switched the focus of suspicion to Harris from McWhorter, and asking the jury to examine carefully Slater's credibility.

The state first called Howard's father to testify that he identified his son's body at the morgue. This was not objected to, although the identity of the victim was not in dispute. Harris does not claim error from this failure.

The state next called Maurice Williams, who knew the victim as "Pete." Williams came to Pete's aid soon after the shooting by calling the police. Williams testified that he noticed McWhorter (Buster) among the crowd of persons that had gathered around the scene of the shooting. (Tr. 46, 51.)

On December 20, 1977, the state examined Officer Joseph Michello, one of the police officers that appeared on the scene after the shooting. Musberger's cross-examination centered on the location of Howard's body upon his arrival on the scene.

The state next called Antonio Slater, who explained on direct examination that he arrived at the scene of the shooting while driving south on Christiana (a one-way southbound street) at about 20 m.p.h. Slater testified that he crossed the intersection of 16th and Christiana and when he was about 12 feet behind a parked vehicle that was blocking his way, he heard a shot and noticed two men standing near each other. He witnessed the man with his back to Slater push the other man, who fell. This occurred about 12 feet in front, or south, of the car that was parked in front of Slater's. The man who had pushed the other man down, turned and ran to the parked car, turned and faced Slater, pulled up a pistol at Slater, and jumped into the passenger

section of the car. (R. 71–76.) When the pistol was pointed at him, Slater crouched. (R. 79.) The car pulled away. (R. 76.)

When asked to identify the man who apparently shot Howard, Slater responded, "Wayne" and in court identified Harris as Wayne. (R. 77–78.) Slater testified that he knew Wayne from a poolroom at 18th and Kedzie. He testified:

> I don't actually know [Harris], I know him by people speaking to him, you know, but about two years I have seen him up there . . . . about once or twice a month.

(R. 78.) Slater was able to see Wayne because gold street lights along Christiana were lit and because his headlights were shining on Wayne's waist. (R. 81.)

Slater was next asked about going to the police station. He testified that he went there in August 1977 with his uncle and talked to Investigator Tom Shine. Slater testified that he had not been contacted before he went to the station. (R. 84.)

Musberger then cross-examined Slater. He first pointed out that it took Slater six weeks to go to the police with his story. (R. 89.) He highlighted that Slater had changed his reason for having been in the area of 15th and Christiana on that night. Musberger also highlighted inconsistencies between Slater's pretrial statements and his trial testimony. Musberger also impeached Slater's story that he had seen Wayne several times over the previous two years. (R. 109–110.)

After Slater, two other witnesses were called by the prosecution on the issue of the cause of death. On December 21, 1977, the defense rested without putting on any evidence. (R. 130.) The portions of the opening argument suggesting that McWhorter or others might have been responsible for the shooting were ignored completely. Later that afternoon, the jury returned a verdict that Harris was guilty of murder.

After sentencing, Harris was represented by an Assistant Appellate Defender, Nancy Abrahams, on direct appeal. Abrahams presented one argument on appeal, namely, that the evidence was insufficient constitutionally to support a conviction for murder. (Respondent's Attachment, filed 2/15/85, Brief for Appellant.) On June 4, 1979, the Appellate Court found the evidence constitutionally sufficient and affirmed the conviction. (*Id.* at Order Disposing of Appeal under Supreme Court Rule 23 [direct appeal]).

On July 17, 1979, Abrahams, as Harris's stand-by counsel, filed Harris's pro se petition for post-conviction relief. (Harris's Motion in Opposition, filed 11/21/83, at 8–9.) In the post-conviction petition, Harris raised two issues: (1) ineffective assistance of trial counsel, and (2) newly discovered evidence. The public defender's office was granted leave to withdraw, and Attorney Loretta Hall Hardiman assumed prosecution of the petition. She filed an amended post-conviction petition, dropping the newly discovered evidence claim.

The lower post-conviction court held a hearing on March 27, 1980. A second hearing on the amended petition occurred on March 19, 1981. (The transcript is attached as Exhibit 3 to Harris's Motion to Reconsider, filed 10/18/82.) The court denied the petition at the close of that hearing, without convening a hearing in which to take testimony. *Id.* at 27. Assistant Appellate Defender Bruce Mosbacher represented Harris on appeal of this decision. The denial of post-conviction relief was affirmed on February 22, 1983. (Respondent's Answer and Memorandum, filed 10/21/83, Order Disposing of Appeal Under Supreme Court Rule 23 [post-conviction].)

Claims for Relief

Harris first claims that he was unduly prejudiced by the state court delay in disposing of his post-conviction petition. According to Harris, certain alibi witnesses (the Connor family) moved to Mississippi in late 1979 and Z. Mary Connor died in December 1979. (Original Petition, attachment, at 1–2.) This loss of evidence, caused by the alleged inexplicable delay, is offered as support for the claim that Har-

ris is now in custody in violation of the federal constitution.

Harris's second claim for relief is based on alleged ineffective assistance of counsel. According to Harris, his trial counsel failed properly to investigate witnesses and to impeach the testimony of Antonio Slater. Harris listed several errors in his amended petition for habeas corpus, all of which were raised in his amended petition for post-conviction relief.

1. Counsel failed to interview or call as witnesses Investigators B. Peck and L. Sykes to impeach Slater. These witnesses would testify that "the victim was shot in the gangway," although Slater testified the victim was shot on Christiana street. (Amended Petition for Habeas Corpus Item H.)

2. Counsel failed to interview or call as witnesses Alice Riles or Leroy Carter. Both saw two men running from the scene of the shooting at the time of the shooting. Both identified McWhorter as one of the two men. Riles indicated in the police report that she could identify the other man by appearance. Police records contained this information.

3. Counsel failed to investigate or call as a witness George Williams. Williams would testify that he was with McWhorter the night of the shooting, that he knew the victim through a long history of drug dealings, and that Harris was not at the scene of the shooting. Police records contained this information.

4. Counsel failed to call police investigator Shine or any other investigator to impeach Slater's testimony that he did not hang out in the area of the shooting and that he had never been in that area. Shine also could have impeached Slater's statement that he came to the police station voluntarily, although Shine's report indicates an informant provided Slater's name and the police contacted Slater. Counsel also did not seek the identity of the informant.

5. Counsel failed to offer into evidence the agreed stipulation that "would have perfected the impeachment of the witness Slater [sic] trial testimony that he turned off Christiana from 16th Street and witness [sic] the crime." (*Id.* at Item O.)

6. Counsel failed to call or investigate residents of 18th and Kedzie, who could testify that no pool room existed at that corner, thereby impeaching Slater's testimony that he knew Harris as Wayne from "seeing him every month at a pool room on 18th and Kedzie." (*Id.* at Item Q.)

7. Counsel failed to interview, investigate, or call as witnesses four alibi witnesses: Jewel Connor, Z. Mary Connor, Genise Connor, and Charles Thomas. Harris provided counsel with the names and addresses of the witnesses. These witnesses would have testified that Harris was ill and in bed at the Connor's home on the night of July 9, 1977 and was later hospitalized on July 13, 1977 for that same illness. (See Affidavits attached to original petition for habeas corpus.)

8. Counsel failed to call any of the doctors who treated Harris at Cook County Hospital to testify and corroborate his alibi witnesses' story that he was hospitalized on July 13, 1977 with an illness that would indicate he was also ill on July 9, 1977.

All of the names contained in this list of alleged errors, except the names of the alibi witnesses, are contained in the police records and in the state's list of potential witnesses. (See Harris's Requested Records and Information filed 2/25/85 [Answer to Discovery].) According to Harris's amended post-conviction petition, he did not learn that counsel would present no defense evidence until December 21, 1977, the last day of trial. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 1 at p. 3 [Amended Petition for Post-Conviction Relief].)

Harris's third contention is that his detention is unconstitutional because newly discovered evidence establishes his innocence. This evidence is an affidavit executed by Melvin McWhorter, who would testify that Slater was not present at the scene of the shooting and that he witnessed George Williams shoot the victim. Harris notes that Riles, Carter, and Williams corroborate some of these facts, including that Williams and McWhorter were together that night and that McWhorter was seen leaving the scene of the shooting. (The court notes that, accepting as true Harris's counsel's opening statements, this would be McWhorter's third story. The first was that he knew nothing about the shooting; the second, that he was across the street from the shooting but saw nothing; and the third, that he saw Williams shoot Howard.)

Harris's final claim is that the evidence was constitutionally insufficient to convict him of murder beyond a reasonable doubt. He claims Slater's testimony was so inconsistent as to be incredible.

Legal Discussion

I. Post-Conviction Delay

Harris's first claim for relief stems from alleged prejudicial delay in the disposition of his Illinois petition for post-conviction relief. This claim was raised in Harris's original habeas corpus petition, which was received by the Clerk of the United States District Court on January 31, 1980 and filed on February 8, 1980. Harris had previously filed, on July 17, 1979, a petition for post-conviction relief. (Stand-by counsel Abrahams' affidavit evidences that she filed the petition on that date. *See* Abrahams Aff., attached to original petition for habeas corpus.)

Starting in early 1980, therefore, Harris had proceedings concerning the validity of his conviction pending simultaneously in both federal and state court. While District Judge Joel Flaum considered various issues regarding Harris's petition (basically mootness and exhaustion), Harris attempted to get his claims resolved in state court as well. The post-conviction petition was denied by the lower state court on March 21, 1981. On October 4, 1982, the federal district court dismissed Harris's petition for failure to exhaust available state remedies, because Harris at that time had an appeal of the post-conviction decision pending in the Illinois Appellate Court. On April 4, 1983, Judge Flaum granted Harris's motion to reinstate his action and file an amended petition for habeas corpus, as exhaustion had been accomplished by that date.

Harris complains that his petition for post-conviction relief was "in limbo" for 7½ months before any action thereon was taken by the Illinois courts. Since one of his four alibi witnesses died in late December 1979 and all had moved to Mississippi by the end of 1979, Harris contends that the delay in processing his post-conviction petition was unconstitutionally prejudicial.

[1–3] To the extent that Harris's claim based on post-conviction delay sought relief from the exhaustion requirement in habeas cases, that claim is clearly moot. Inordinate delays in state procedures, such as post-trial motions, appeals, and post-conviction remedies, may excuse exhaustion in circuits where exhaustion is not considered a jurisdictional requirement. *See McGee v. Estelle*, 722 F.2d 1206, 1209–11 (5th Cir. 1984); *Baldwin v. Lewis*, 442 F.2d 29, 32–33 (7th Cir.1971). The remedy for inordinate delay is normally immediate consideration by the federal court of petitioner's federal claims, an effective waiver of the exhaustion requirement. *See Dixon v. State of Florida*, 388 F.2d 424, 426 (5th Cir.1968); *Rheuark v. Wade*, 540 F.2d 1282, 1283 (5th Cir.1976) (direct appeal); *cf. United States ex rel. Smith v. Twomey*, 486 F.2d 736, 738–39 (7th Cir.1973), *cert. denied*, 416 U.S. 994, 94 S.Ct. 2408, 40 L.Ed.2d 773, *reh'g denied*, 417 U.S. 959, 94 S.Ct. 3089, 41 L.Ed.2d 677 (1974). However, because Harris has exhausted his state appellate and post-conviction remedies, such a claim would now be moot.

Harris may also be arguing that the Illinois delay effectively deprived him of the right to present his constitutional claims in a federal forum, as evidence was lost during the delay. Harris is thus not attacking the adequacy of Illinois post-conviction procedures per se—an attack that would prob-

ably not rise to a constitutional violation, *see Williams v. State of Missouri*, 640 F.2d 140, 143–44 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981)—but the effect of Illinois post-conviction procedures on the federal right of habeas corpus. At least one court has hinted that an inordinate delay, in that case twelve years, may violate petitioner's rights, even absent any trial error. *Codispoti v. Howard*, 589 F.2d 135, 142 (3d Cir. 1978).

[4] Assuming that the Illinois delay in disposing of Harris's post-conviction petition was inordinate and could violate his right to a full and fair consideration of his federal habeas claims in federal court, however, Harris's claim appears to be without merit. The death of one of four alibi witnesses, Z. Mary Connor, alone is not prejudicial, since her testimony would be cumulative (all were in the same dwelling with Harris on the night of the shooting; three, including the deceased witness, executed affidavits to that fact). Moreover, while the witnesses now live out of state, Harris does not claim that they are inaccessible should their testimony be needed. On the present record, therefore, Harris has suffered no prejudice from the delay.

[5] The court doubts that post-conviction delays, absent a showing of prejudice, alone could justify release of a petitioner for federal habeas corpus relief. Even if such a delay by itself could be reason for release, however, the delay in this case could not have violated Harris's federal due process rights. This delay appears to have been the result of misplacement of Harris's post-conviction petition. Moreover, cases examining delays in state procedures involve time periods far in excess of seven months. The 7½ month delay in this case is not so egregious that, absent prejudice, it could justify issuance of the writ for violation of Harris's federal due process rights.

Respondent's motion for summary judgment is granted as to Harris's claim of post-conviction delay.

II. Ineffective Assistance of Counsel

A. Waiver

As was discussed above, the one issue presented on direct appeal by Assistant Appellate Defender Nancy Abrahams was the lack of sufficient evidence on which to convict. The court's own examination of Harris's and the state's legal memoranda on direct appeal confirms this fact. Moreover, the Illinois Appellate Court's opinion on direct appeal addressed only the sufficiency of the evidence, and not the other issues raised by Harris in his petition for federal collateral review.

The original and amended post-conviction petitions raised the issue of ineffective assistance of trial counsel. The court is provided with the transcript of the March 19, 1981 lower court post-conviction hearing. The transcript reveals that Harris's attorney Hardiman and the state vigorously disputed the merits of the ineffective assistance of counsel claim. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 6–27 [Transcript].) However, the parties also discussed the possibility that Harris waived his right to raise the issue through failure to preserve it on direct appeal. (*Id.* at 3–4, 7.) Moreover, the hearing court was aware of the waiver issue, as demonstrated by this comment:

> My question as a judge in this case is to determine whether or not, as a result of the trial that was had, the defendant had a fair trial, ... and if not, any matters that were improperly handled, those matters should have been raised on the basis of an appeal [sic].

(*Id.* at 26.) In any case, the hearing court also appeared to reach the merits of the ineffective assistance claim:

> On the basis of [the fact that the alibi witnesses were Harris's friends], I have considered all aspects, I have heard your arguments, I have heard the arguments of the state, and it is the opinion of the court that the defendant had been properly represented, that he had been given proper consideration on his appeal, both by the appellate court and the supreme court, and accordingly, this court is hereby denying your petition, and it is hereby dismissed.

(*Id.* at 27.)

In affirming the denial of Harris's post-conviction petition, the Illinois Appellate Court noted that in Illinois, arguments raised in post-conviction proceedings but not preserved on appeal are barred by *res judicata* if the arguments are based on facts that are of record. *See People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist.1979). The Court then pointed out that all facts, except those relating to the alibi witnesses, were reflected in the trial court record.

After making this point, the Court did not conclude that Harris had waived his ineffective assistance claims in full, but instead went on to consider the merits of those claims. The Court's manner of addressing the claims indicates that it considered the merits of the ineffective assistance arguments with respect to the alibi witnesses as well as with respect to of-record evidence:

> Competency is determined from the totality of counsels's conduct at trial. [Citation omitted.] In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney....
>
> Defendant *also* contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present alibi witnesses and to present an alibi defense.

(Respondent's Answer and Memorandum, filed 10/21/83, "Order Disposing of Appeal Under Supreme Court Rule 23", at 5–6 [post-conviction].) (emphasis added.)

The Court continued to discuss the standards of effective assistance and to evaluate the quality of the assistance provided in Harris's case. For example, the Court noted trial counsel's vigorous cross-examination of Slater, which highlighted certain inconsistencies between his trial testimony and his pre-trial statements. The Court also pointed out that trial counsel has great discretion in determining which, if any, witnesses to call in his or her client's defense. According to the Court, Harris's counsel could reasonably and competently have chosen to rely on cross-examination of state witnesses and the state's failure to sustain its burden in prosecuting Harris. (*Id.* at 6.) The Court concluded that "the representation [Harris] received at trial [did not result] in substantial prejudice without which the outcome would probably have been different." (*Id.* at 7.)

[6] It is clear that in Illinois, failure to raise on appeal the issue of ineffective assistance of trial counsel results in waiver of that issue for post-conviction review. *People v. Edmonds, supra; see* cases collected in *United States ex rel. Devine v. DeRobertis*, 754 F.2d 764, 766 n. 1 (7th Cir.1985). These authorities indicate that an exception to the waiver rule occurs when the basis for the claim is not found in the record.

In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court held that a petitioner could not litigate collaterally in federal court an issue that state procedural law prevented from being presented to the state appellate courts. This ruling was extended by the Seventh Circuit in *United States ex rel. Spurlack v. Wolff*, 699 F.2d 354, 356 (7th Cir.1983), to a failure to present properly preserved trial objections on appeal.

[7, 8] Under *Sykes*, such a "waiver" of the right to present an issue to the federal courts on collateral review may be overcome only by a showing of "cause" and resulting "prejudice." Cause and prejudice are flexible concepts, satisfaction of which changes with the circumstances of a particular petitioner. *Clay v. Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 433–34 (7th Cir.1984). Moreover, under circumstances constituting a "miscarriage of justice," a *Sykes* waiver, not cured by satisfaction of the cause and prejudice test, may be ignored. *Id.*

[9] Sometimes a state court will consider the merits of an issue that may not have

been properly preserved by timely objection or appeal. Where a state court ignores a procedural default and reviews the substantive merits of what would otherwise be a waived issue, federal courts must review the merits of that issue in a petition for habeas corpus. *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 951, (7th Cir.1982). However, where a state court has clearly reached both the merits of the waiver question and the substantive merits of the improperly raised issue, the Seventh Circuit has found that absent a showing of cause and prejudice, *Sykes* bars federal collateral review. *Farmer v. Prast*, 721 F.2d 602, 605 & n. 5 (7th Cir. 1983); *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir.1982); *see Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1243 n. 1 (7th Cir. 1984).

In the present case, the Illinois Appellate Court made clear, and respondent agrees, that the issue of ineffective assistance of counsel was not waived as to facts not in record. According to the Appellate Court, those facts include the affidavits of the four alibi witnesses. This court notes additionally that the record appears to contain no indication (1) that Harris might have been confined to Cook County Hospital shortly after the shooting as a result of a serious illness, (2) that no poolroom existed at 18th and Kedzie, and (3) that McWhorter swore that George Williams committed the shooting. Respondent argues that to the extent that Harris's ineffective assistance of counsel claim depends on trial counsel's omissions indicated in the record, the claim was waived.

The court's review of the trial and appellate opinions on post-conviction review persuades it that the Illinois state courts ignored any waiver by Harris of his right to rely on "record" omissions. The question is whether Harris's case is more like that presented by *Williams* or by *Farmer*. If more like the former case, then federal collateral review is proper with respect to all omissions raised in the amended post-conviction petition also raised in the pending petition for habeas corpus.

In *Williams*, the Illinois Appellate Court "note[d] at the outset [that] the State is correct in its argument [that] the defense counsel waived [this issue] by failing to object to the trial court's [ruling]." *People v. Ross*, 63 Ill.App.3d 884, 20 Ill.Dec. 688, 692, 380 N.E.2d 897, 901 (1st Dist.1978). The Court followed this statement with citations to three Illinois Supreme Court cases supporting the state's waiver argument. *Id.* However, the Court never explicitly stated that the issue was waived. The Court then continued to reach the merits of the claim, finding that the improperly raised issue was substantively without merit. According to the Seventh Circuit in *Williams*, this treatment of what would otherwise be a waived claim allowed federal collateral review of that claim. *Williams*, 687 F.2d at 951.

In contrast, the *Farmer* Court, on appeal from denial of a post-conviction petition, explicitly found that the petitioner had waived his claim before examining the issue presented. *Farmer*, 721 F.2d at 605. Similarly, the Court in *Veal* distinguished an express ruling on procedural default from a mere discussion thereof for purposes of applying the *Sykes* bar to collateral review. *Veal*, 693 F.2d at 650. An express ruling on procedural default, presented as an independent and alternative ground for denying relief, prevents federal collateral review.

[10] The treatment of Harris's claim is strikingly similar to that involved in *Ross*. In the February 22, 1983 denial of Harris's post-conviction appeal, the Court simply noted that waiver appeared to operate, but then continued to treat the merits of the improperly raised issue. Both the *Harris* and the *Ross* courts did not appear to make two rulings in the alternative, but rather to note a procedural default and then ignore it, reaching the merits instead. The court is therefore persuaded that Harris's ineffective assistance of counsel claim may be presented to the federal court with respect to all omissions raised in the amended post-conviction petition.

B. Merits of Ineffective Assistance Claim

[11] The United States Supreme Court has recently issued two opinions concerning the scope of the sixth and fourteenth amendment right to effective assistance of counsel. *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The Court noted the universally accepted principle that the federal constitution guarantees "reasonable effective assistance." *Strickland*, 104 S.Ct. at 2062. A convicted defendant, to prevail on an ineffective assistance of counsel claim, must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 2065.

The *Strickland* Court stressed that "[c]ounsel ... has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," *id.*, and that "counsel's function ... is to make the adversarial testing process work in the particular case," *id.* at 2066. Reasonable professional judgments must support counsel's actions. If counsel did not conduct a complete investigation of a particular matter, a reasonable professional basis for not conducting that investigation will defeat an ineffective assistance claim. *Id.* at 2066.

In addition to demonstrating an unreasonable professional error by counsel, a defendant must also show that the error had an effect on the judgment:

> The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 2067. The court went on to describe the circumstances under which prejudice is presumed, *see id.* at 2607; *United States v. Cronic*, 104 S.Ct. at 2046–2047 & n. 25, and under which prejudice must be affirmatively shown by defendant, *Strickland*, 104 S.Ct. at 2067–68. Where defendant must demonstrate prejudice, as in this case, the test that must be satisfied is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." When a petitioner challenges his conviction, "the question is whether there is a reasonable probability that, absent the error, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 2069.

[12] Defendants challenging the constitutional sufficiency of their counsel must prove both parts of this test. Thus, the *Strickland* Court made clear that a finding that one part was not established obviates a decision regarding the other part. *Id.* A court may also review counsel's performance by addressing the prejudice component first, or vice versa. *Id.* When examining counsel's performance, "'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' that might be considered sound trial strategy." *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir.1984) (citing *Strickland*, 104 S.Ct. at 2065–66). *E.g., McKinney v. Israel*, 740 F.2d 491, 492 (7th Cir.1984) (court addressed only prejudice element and finding lack thereof, declined to reverse denial of writ); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) (finding of incompetent counsel performance without resultant prejudice; court affirmed denial of writ).

[13] Regarding proper defense counsel preparation, the Seventh Circuit has explained:

> It is undisputed that a defense counsel "should make reasonable investigations into all defenses," *United States v. Zylstra*, 713 F.2d [1332] at 1338 [(7th Cir. 1983)], and that such investigations encompass the interviewing of witnesses. *United States v. Decoster*, 624 F.2d 196,

209 (D.C.Cir.1976) (en banc) (plurality opinion).

Arrowood v. Clusen, 732 F.2d 1364, 1370 (7th Cir.1984). In *Crisp v. Duckworth*, the Seventh Circuit examined extensively claims of ineffective assistance of counsel at the investigation and trial preparation stages, the stages implicated in the present petition. In that opinion, the Court stressed again the importance of pretrial investigation to reasonably competent representation:

> Effective representation hinges on adequate investigation and pre-trial preparation. *See United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21, 24–25 (7th Cir.1976) (as corrected) (mere appearance of in-court effectiveness cannot compensate for inadequate pre-trial preparation).... Investigation may help an attorney develop or even discover a defense, locate witnesses, or unveil impeachment evidence. Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation. [Citations omitted.]
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>
> We do not agree that police statements can generally serve as an adequate substitute for a personal interview. *See United States v. Tucker*, 716 F.2d [756] at 583 & n. 17 [(9th Cir.1983)]; *United States v. DeCoster*, 487 F.2d [1197] at 1204 [(D.C.Cir.1973)] ("a defense attorney ... should interview not only his own witnesses but also those that the government intends to call").

743 F.2d at 583–584. It is true that a defense attorney's discretion is broad, and that so-called "trial strategy" may excuse omissions that otherwise would appear inexcusable. However, the Seventh Circuit clearly recognized in *Crisp* that

> [t]hough there may be instances when the decision not to contact a potential defense witness is justified, [citation omitted], an attorney who fails even to interview a readily available witness whose noncumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the shield of "trial strategy and tactics," [citation omitted]; *see also Davis v. Alabama*, 596 F.2d [1214] at 1217 [(5th Cir.1979)] ("An attorney does not provide effective assistance of counsel if he fails to investigate sources of evidence which may be helpful to the defense."); *United States v. DeCoster*, 487 F.2d at 1201 (A court should not "second guess strategic and tactical choices made by trial counsel. However, when counsel's choices are uninformed ... a defendant is denied the effective assistance of counsel.")

743 F.2d at 584.

[14] In this case, Harris claims that his counsel failed to interview and to call numerous witnesses. Some of the omissions could have led to impeachment, such as Slater's claim that he voluntarily appeared at the police department, that he did not hang around the crime scene area, and that there was a poolroom on Kedzie and 13th where he frequently saw Harris and knew him as "Wayne." In a case dependent solely on eye witness identification, where the identification is bolstered by the witness's prior knowledge of the defendant, this impeachment is important. Counsel's alleged failure to investigate certain witnesses could also amount to ineffective assistance of counsel. For example, Harris claims that his counsel did not interview Carter and Riles, who were present on the first day of trial. These two witnesses identified two men running from the scene of the crime. One of the men was McWhorter, according to both witnesses, and the other's identity is unclear. Riles told the police she could identify the other if shown his picture. Perhaps Riles and Carter could have identified Williams as the man running from the scene with McWhorter (Williams claims he was with McWhorter that night). This testimony could have been offered by the defense as an exculpatory version of the shooting. Finally, alibi witnesses, willing and available, were not called and the hospital records allegedly were not checked.

Taking Harris's allegations as true, his trial counsel's failure to conduct the above-described investigations would fall below the standard of reasonably competent representation. It is axiomatic that a defense counsel must interview witnesses to the crime and alibi witnesses. Trial counsel should also interview witnesses such as Riles and Carter, who did not witness the shooting but who observed areas near the crime scene at the time of the shooting. Finally, possible suspects, such as Williams, should be interviewed as possibly providing an alternative, exculpatory version of the events. (Such a version was alluded to by Kuhlen in Harris's opening statement.)

Respondent, the party moving for summary judgment, offers the October 14, 1983 affidavit of Todd Musberger as evidence of Musberger's competency. Musberger states that, "My best recollection is that Alice Riles and Leroy Carter were among the witnesses that could not be located. All police witnesses were interviewed before the trial and each cross examination was made with the most effective trial strategy in mind." (Respondent's Answer and Motion, filed 10/21/83, Musberger Affidavit.) However, the trial record indicates that Riles and Carter were in court on the day trial started, (Tr. 23), at least one because of Musberger's subpoena. This inconsistency, plus Musberger's failure to state explicitly whether he interviewed these two witnesses, prevent the court from determining on this motion that Musberger did investigate these witnesses and make an informed judgment regarding use of their testimony at trial.

Regarding the alibi witnesses, Musberger states:

> On two occasions that I presently recall, I interviewed Jewel Connor, Mary Connor and Genise Connor. I recall interviewing Thomas Charles on one occasion. It was my considered opinion that the jury would not find these people credible. Therefore I decided as a matter of trial strategy not to call any of these people as witnesses at Mr. Harris's trial.

(*Id.*) Musberger does not indicate whether he checked the Cook County Hospital records in an attempt to corroborate this story.

In the affidavits of the alibi witnesses, Z. Mary Connor and Genise Connor state that they were available to testify and were not called, but do not mention whether Musberger interviewed them. Jewel Connor's affidavit indicates that she twice contacted Musberger in an attempt to explain her story to him. Musberger's affidavit is thus technically consistent with these alibi witness affidavits, although Musberger provides no reason for his conclusion that the witnesses were not credible.

Musberger states that he interviewed all police witnesses. As Harris does not claim that Musberger did not interview McWhorter, the court will assume that McWhorter was interviewed. Musberger does not expressly state that he interviewed Williams, who could have testified that Harris was not at the scene of the shooting.

Musberger does not respond to Harris's claims concerning impeachment evidence. While Musberger may not have been allowed to present extrinsic impeachment evidence, reasonably competent counsel should investigate possible avenues of impeachment. The evidence that Slater could not have known Harris through frequent contacts at a poolroom which allegedly did not exist is such an apparent avenue of impeachment.

[15] This discussion reveals that one part of the ineffective assistance of counsel test—that pertaining to reasonably competent professional representation—cannot be decided on this motion. Musberger's affidavit is too general to answer all of Harris's claims. The court may deny a claim of ineffective assistance, however, if the prejudice component is not satisfied. Should Harris's allegations be true, however, he may have satisfied the prejudice

test. On this record and with Musberger's conclusory affidavit, the court cannot make a finding that the alibi witnesses were not credible. Moreover, impeachment of Slater additional to that accomplished at trial would cast further doubt on the reliability of the verdict. This is especially true regarding the nonexistence of a poolroom at 13th and Kedzie, which would impeach Slater's credibility as well as his identification. Finally, the alternative possible version of events, that Williams or McWhorter may have been responsible for the shooting, also casts further doubt on the verdict. Hence, both the competence of counsel's representation and the possible prejudice resulting therefrom should be examined in an evidentiary hearing. Such a hearing is appropriate when facts are in dispute and petitioner was not afforded a full and fair hearing on the ineffective assistance issue in the state system. *Townsend v. Sain*, 372 U.S. 293, 312–13, 83 S.Ct. 745, 756–57, 9 L.Ed.2d 770 (1963).

Respondent's motion for summary judgment as to ineffective assistance of counsel is denied. An evidentiary hearing on this claim will be set. Harris will be appointed counsel to aid him in this hearing. Rules Governing § 2254 Cases, 28 U.S.C. fol. § 2254, Rule 8(c).

III. Newly Discovered Evidence

Harris's third claim is that his custody violates the federal constitution, as newly discovered evidence demonstrates he is innocent of the charged crime. In Harris's original post-conviction petition, which Abrahams states she filed on July 17, 1979, Harris requested a new trial based on newly discovered evidence and on ineffective assistance of counsel. Paragraphs 1 through 6 contain the allegations of newly discovered evidence, namely, the affidavit testimony of Melvin McWhorter. This affidavit reads in part:

> I was acquainted with Pete Earnest Howard befor [sic] he was killed and have on occasion, purchased narcotics from him.
>
> On July 9, 1977, at about 10:00 PM., I was present in the fifteen-hundred block of South Christiana Avenue and consequently, witnessed the shooting of Mr. Howard. He was shot by George Williams, whom I have known for over twelve (12) years.
>
> I am also acquainted with Antonio Slater.... On July 9, 1977, Antonio Slater was not present in the fifteen-hundred block of South Christiana at 10:00 oclock [sic] pm. the night Pete Earnest Howard was killed.

(McWhorter Aff., dated June 29, 1979.) Harris alleges in his original post-conviction petition that this evidence was not and could not have been discovered by him or his counsel at an earlier date.

The amended post-conviction petition, however, omits the claim of newly discovered evidence. Rather, the entire claim rests on the allegation of ineffective assistance of counsel. No mention is made of the McWhorter affidavit, although it was incorporated as an exhibit to the amended petition. (Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 1–6 [Transcript].) At the March 19, 1979 hearing, Harris's attorney Hardiman did not mention the McWhorter evidence.

As discussed above, the lower post-conviction court found that Harris had been provided effective assistance of counsel. It did not mention newly discovered evidence. On appeal of the postconviction petition, it is clear that ineffective assistance was also the only issue presented. (*See* Motion of Exceptions, filed 8/20/82, Exhibit [Brief and Argument for Petitioner-Appellant].) The Appellate Court clearly reached only the ineffective assistance argument. Although it noted the McWhorter affidavit on page 3, the Court failed to mention it again in the opinion.

[16, 17] In Illinois, in order to obtain a new trial based on newly discovered evidence, a defendant must show that the evidence could not have been produced at trial by use of reasonable diligence, that the evidence is noncumulative, and that the evidence is of such a conclusive character that it would probably change the result. *People v. Sullivan*, 95 Ill.App.3d 571, 51 Ill.Dec. 60, 420 N.E.2d 474 (1st Dist.1981). Motions for new trial are subject to close scrutiny, *People v. Carpenter*, 74 Ill. App.3d 770, 80 Ill.Dec. 395, 393 N.E.2d 50 (1st Dist.1979), and have been frequently characterized as "disfavored," *e.g.*, *People v. Wolf*, 48 Ill.App.3d 786, 6 Ill.Dec. 720, 863 N.E.2d 402 (2d Dist.1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1469, 55 L.Ed.2d 506 (1978); *cf. United States v. Feldman*, 756 F.2d 556, 560 (7th Cir.1983).

[18, 19] Newly discovered evidence must be presented to the trial court in a motion for new trial. Motions for new trial are governed by Ill.Rev.Stat. ch. 38, ¶ 116–1, which provides that they must be brought "within 30 days following the entry of a finding or the return of a verdict." *Id.* at ¶ 116–1(b). Exceptions to this 30-day requirement are narrow. *People v. Ferguson*, 102 Ill.App.3d 702, 57 Ill.Dec. 958, 429 N.E.2d 1321 (1st Dist.1981), *cert. denied*, 459 U.S. 872, 103 S.Ct. 159, 74 L.Ed.2d 133 (1982) (where sole prosecution witness recants or where prosecution prevented defendant from discovering evidence). Harris has not alleged compliance with these procedures. Moreover, Harris does not claim that these procedures themselves violate his federal due process rights. *Cf. Griswold v. Greer*, 712 F.2d 1200, 1205 (7th Cir.1983).

A. Waiver

[20] The court will assume that Harris filed a timely motion for new trial based on newly discovered evidence. However, unlike the ineffective assistance of counsel argument, the newly discovered evidence argument was not presented to nor considered by the reviewing Illinois courts. As described above, Harris omitted to make this claim before both the post-conviction and the direct appeal lower and appellate courts. Hence, this court is barred from considering the merits of the claim. *Wainwright v. Sykes, supra.* Harris has advanced no explanation for this procedural default.

B. Merits of Newly Discovered Evidence Claim

[21] Were the court to consider this issue, review would be narrow. In a federal habeas action, courts review the state proceedings for violations of federal constitutional rights. 28 U.S.C. § 2254(a). Hence, a federal court will not review the merits of a state court's denial of a new trial motion solely under the state standards for the granting of a new trial. *United States ex rel. Guillen v. DeRobertis*, 580 F.Supp. 1551, 1556 (N.D.Ill.1984).

[22] The scope of federal habeas corpus review concerning newly discovered evidence is described in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In that case, the Court explained:

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

Id. at 317, 83 S.Ct. at 759. This reason has led courts to the principle that a denial of a motion for new trial based on newly discovered evidence may be reviewed only for the presence of an error of constitutional magnitude. *Subilosky v. Callahan*, 689 F.2d 7, 9 (1st Cir.1982), *cert. denied*, 460 U.S. 1090, 103 S.Ct. 1788, 76 L.Ed.2d 356 (1983); *Guillen*, 580 F.Supp. at 1556. The Fifth Circuit has explained this test as follows:

> Questions of guilt or innocence are not matters to be considered upon petition for habeas corpus. ... Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not to its legality ... [T]he confession 'might be urged as a proper subject for executive clemen-

EDITOR'S NOTE

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CLERK

No. 87-5677

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED STATES OF AMERICA Ex Rel.

WARREN LEE HARRIS,

Petitioner,

-vs-

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois

Respondents.

Supplement to Petition for Certiorari

Kimball R. Anderson
E. King Poor
Counsel of Record

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COUNSEL FOR PETITIONER

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No. 87-5677

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

UNITED STATES OF AMERICA ex rel, WARREN LEE HARRIS, Petitioner, v. MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois, Respondents.	On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 86-2032

PETITION FOR REHEARING

Pursuant to Rule 51.2, the Petitioner, Warren Lee Harris, requests a rehearing of the Court's denial on December 7, 1987, of his Petition for Certiorari, based on a seriously divided en banc decision in Meadows v. Holland, 831 F.2nd 493 (4th 1987).[1/]

I. MEADOWS V. HOLLAND DEMONSTRATES THE CONFUSED STATE OF THE LAW AS TO WHEN A PROCEDURAL DEFAULT MAY BAR HABEAS REVIEW - THE CENTRAL ISSUE IN THIS CASE.

On October 16, 1987, the day the Petition for Certiorari was filed in this case, the Court of Appeals for the Fourth Circuit handed down its decision in Meadows v. Holland, 831 F.2nd 495 (4th Cir. 1987).[2/] (attached) Meadows is an unusual en banc

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1/ A Certificate of Counsel as required by Rule 51.2 is attached. A motion for leave to proceed in forma pauperis was filed with the Petition for Certiorari on October 16, 1987.

2/ We only recently learned of the Meadows decision. We were preparing a Supplemental Brief to bring it to the Court's attention when we received notice that our Petition for Certiorari had been denied.

decision with three separate dissenting opinions and further demonstrates the continuing disarray of the law on the question involved. The vote was 6-4-4-4.[3/] At the core of the Meadows decision and this case is the same issue: when may a procedural default in the state court bar a federal habeas petition? In particular, must a procedural default which serves as an "adequate and independent" state ground for denying habeas relief be clearly demonstrated within the "four corners" of a state court opinion?

In this case, the district court found the Illinois Appellate Court had waived the procedural default and, therefore, allowed a three-day trial on the merits of the Petitioner's ineffective assistance of counsel claim. While the district court held that the issue was "very close", it ruled against the Petitioner on the merits. (Petition for Certiorari at at page 3) On appeal, two judges of the Seventh Circuit disagreed with the district court and interpreted what they admitted was an "ambiguous" state court opinion to read that the procedural default was not waived and hence, any review of the merits was barred. (Id. at pp. 3-4)

In a concurring opinion, Judge Cudahy found it was improper for the majority to second-guess the meaning of the

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3/ Judge Winter is not listed with Judges Phillips and Sprouse as joining in the dissent of Judge Murnaghan's at the bottom of page 503 of the opinion. But, Judge Winter does state that he concurs in Judge Murnaghan's opinion in the first paragraph of his own dissent.

ambiguous state court opinion:

> Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the state courts' power to protect their procedural requirements mereby by making express findings that a petitioner has waived.

822 F.2d at 687.

The same principle that prompted Judge Cudahy's concurring opinion is brought into high relief in Meadows. There, the petitioner's trial counsel failed to challenge a jury instruction which impermissibly placed the burden of proof on the defendant in establishing an alibi defense. On federal habeas review, the district court held (1) the Fourth Circuit's interpretation of West Virginia law did not require a "contemporaneous objection" for constitutional claims and (2) the improper instruction was grounds for granting the petition. 831 F.2d at 495-96. On appeal, the Fourth Circuit sitting en banc overruled its earlier interpretation based on later West Virginia decisions and held that the contemporaneous objection rule did in fact apply to constitutional claims. Id. at 498 As a result of this new interpretation, the petitioner was deemed to have committed a procedural default which barred habeas review. Id.

The majority opinion drew three strongly worded dissents, each joined by three other judges. Judge Winter stated

that the majority's finding of a procedural default was contrary to settled law:

> Because a state contemporaneous objection rule prohibits federal habeas review only if that procedural bar is an adequate and independent state ground for the decision of a state court, the rule barring habeas relief due to procedural default is only available where it is clear from the plain language of the state court's opinion that procedural default was a reason for the decision. [Citation omitted.] Because the independence of any procedural ground for the state court's decision is not apparent from the four corners of the opinions of the West Virginia courts which exhausted petitioner's state remedies in this case, application of the state contemporaneous objection rule is therefore not proper here.

831 F.2d at 504. [Emphasis added]

Judge Phillips underscored the same principle in his dissenting opinion:

> Another settled principle that falls victim to the majority's rush to undo Adkins is, as Judge Winter points out, that of Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2nd 777 (1979), which directs that federal habeas courts should presume against rather than for the existence of state contemporaneous objection rules where the evidence of their existence (or consistent application) was at the critical time unclear in state law. [Emphasis in opinion]
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> * * *
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> Ulster in effect holds that, as a matter of federal law, ambiguities or lack of clarity on the point in state statutory and decisional law are to be resolved in favor of federal habeas petitioners seeking to avoid the bar of the procedural default.

831 F.2d at 507. [Emphasis added]

With the majority opinion in Meadows, the Fourth Circuit now joins the Seventh Circuit in this case in presuming a procedural default from ambiguous state court opinions. Yet, as the dissents in Meadows make plain, it is the settled law of this Court that such a finding can only be made where such a procedural default is clear from the face of the state court opinion. The reason for this principle has been palpably demonstrated here and in Meadows; different federal courts may interpret ambiguous decisions differently. Thus, constitutional rights cannot be left to the mercy of how a particular federal court will interpret an ambiguous state court opinion.

Moreover, with the Meadows case, the Fourth Circuit also joins the Third and Seventh Circuits as being wholly at odds with the rule in the Fifth and Tenth Circuits that a procedural default will prohibit federal habeas review only if it is the "exclusive ground" for the state court opinion. (See Petition for Certiorari at pp. 6-7.)[4/] The deeply divided court in Meadows forcibly demonstrates that the law of when a procedural default may bar habeas review is in a state of confusion which only this Court can resolve.

Finally, on December 15, 1987, a Petition for Certiorari was filed in Meadows. (No. 87-6063). Due to the similarity of

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4/ A decision from the First Circuit on October 9, 1987 points to yet another approach. In Puleio v. Vose, 830 F.2d 1197 (1st Cir. 1987) the court held that it could find a waiver of a procedural default only when the state court reached the "gist of the federal constitutional question". Id. at 1200.

the issues in both cases, the Petitioner requests that if certiorari is granted in Meadows that the denial of certiorari here be vacated and that this case be considered in tandem with Meadows.

II. CONCLUSION

The petitioner respectfully requests that the Court's order of December 7, 1987, denying the Petition for Certiorari be vacated and that this petition be considered along with the petition for certiorari in Meadows.

Respectfully submitted,

WARREN LEE HARRIS

By: _____
Counsel of Record

Kimball R. Anderson
E. King Poor
Counsel of Record

WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

CERTIFICATE OF COUNSEL FOR
PETITION FOR REHEARING

Pursuant to Rule 51.2, counsel for the petitioner, Warren Lee Harris, hereby certifies that the foregoing Petition for Rehearing is restricted to substantial intervening grounds, namely, the en banc decision in Meadows v. Holland, 831 F.2nd 493 (4th Cir. 1987), which was handed down on October 16, 1987, the same day that the Petition for Certiorari in this case was filed.

Counsel for petitioner further certifies that this Petition for Rehearing is filed in good faith and not for the purpose of delay.

WARREN LEE HARRIS, Petitioner

By: _____
Counsel of Record

be so extensive in potential scope as to constitute pattern); *see also HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir.1987) (applying *Zephyr* to find no pattern in single scheme extending over long period and involving many predicate acts aimed at corrupting political processes to gain competitive advantage).

IV

[7] Eastern's antitrust claim is based upon the defendants' acts of copyright infringement and appropriation of confidential business information. The district court held this not to be the type of conduct at which the antitrust laws are aimed, and we agree. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1283 (7th Cir.1983). Moreover, the antitrust laws are inapposite here because the only damage is to Eastern as a *competitor;* there is no alleged injury to *competition* in the relevant market. *See id.*, at 1284–85; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Eastern complains on appeal that in finding no injury to competition, the district court erroneously believed that there were no competitors in the market other than Eastern and Chesapeake. The court noted that before the creation of Chesapeake, there was only one market entity, Eastern, and that if events transpire as Eastern predicts, there will only be one market entity, Chesapeake. Therefore, there was no injury to competition. Eastern now avers for the first time that there are other competitors who are also harmed by Chesapeake's activities. We decline to take into account these other alleged competitors because their existence and injury were not averred in the complaint nor in any way suggested to the district court.

AFFIRMED.

WEST KEY NUMBER SYSTEM

David MEADOWS, Plaintiff-Appellee,

v.

Manfred G. HOLLAND,
Defendant-Appellant.

No. 86-6748.

United States Court of Appeals,
Fourth Circuit.

Argued June 1, 1987.

Decided Oct. 16, 1987.

Petitioner, who had been convicted of first-degree murder, sought habeas corpus relief. The United States District Court for the Southern District of West Virginia, Elizabeth V. Hallanan, J., granted petition, and Attorney General appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that: (1) West Virginia treats failure to object to trial errors as default of any right to assert errors on direct appeal or in habeas review, and thus, state is entitled to offer conclusive defense of procedural default in response to federal habeas petition unless petitioner can establish both cause and prejudice for failure to object at trial, and (2) failure of habeas corpus petitioner to challenge at trial the constitutionality of alibi instruction treating alibi as affirmative defense was not justified by "cause," and thus, petitioner could not raise constitutionality of alibi instruction on petition for habeas corpus.

Reversed and remanded.

Murnaghan, Circuit Judge, filed dissenting opinion in which James Dickson Phillips and Sprouse, Circuit Judges, joined.

Harrison L. Winter, Chief Judge, filed dissenting opinion in which James Dickson Phillips, Murnaghan, and Sprouse, Circuit Judges, joined.

James Dickson Phillips, Circuit Judge, filed dissenting opinion in which Harrison L. Winter, Chief Judge, and Murnaghan and Sprouse, Circuit Judges, joined.

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1. **Habeas Corpus** ⇐45.3(1.30)

Deference afforded state contemporaneous objection rule in federal habeas proceedings is more than merely matter of comity; rather, it is implicit recognition of fact that procedure which encourages timely consideration of all issues relevant to criminal prosecution has substantial independent value.

2. **Habeas Corpus** ⇐45.3(1.50)

Decision in federal habeas proceeding that state does not require contemporaneous objection is a significant determination with effect of substantially diminishing concept of finality and operation of state criminal justice system; it is, therefore, a conclusion that should not be reached lightly or without clear support in state law.

3. **Habeas Corpus** ⇐45.3(1.39)

West Virginia treats failure to object to trial errors as default of any right to assert errors on direct appeal or in habeas review, and thus, state is entitled to offer conclusive defense of procedural default in response to federal habeas petition unless petitioner can establish both cause and prejudice for failure to object at trial; overruling *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.).

4. **Habeas Corpus** ⇐45.3(1.50)

Failure of habeas corpus petitioner to challenge at trial the constitutionality of alibi instruction treating alibi as affirmative defense was not justified by "cause," but could only be treated as tactical decision to which petitioner was bound, and thus, petitioner, who was represented by competent counsel at trial, could not raise constitutionality of alibi instruction on petition for federal habeas corpus relief.

Silas B. Taylor, Deputy Atty. Gen. (Charles G. Brown, Atty. Gen., Charleston, W.Va., on brief) for appellant.

James Audley McLaughlin, Charleston, W. Va. (Deborah C. McHenry, West Virginia University College of Law, Morgantown, W.Va., on brief) for appellee.

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges, sitting en banc.

K.K. HALL, Circuit Judge:

The Attorney General of the State of West Virginia, acting on behalf of Manfred G. Holland, Superintendent of the West Virginia State Penitentiary ("the State"), appeals an order of the district court granting a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 by David Meadows, a West Virginia inmate. We granted an initial en banc hearing in this matter in order to review definitively, the State's contention that a prior decision of this Court interpreting West Virginia law and relied upon by the district court in granting habeas relief was wrongly decided. We now reverse.

I.

On April 17, 1981, petitioner Meadows was found guilty by a jury in Mercer County, West Virginia, of the first degree murder of a former girlfriend, Gloria Darlene Hairston. Hairston had disappeared from her home on the evening of November 28, 1979. Her body was eventually discovered on January 17, 1980. She had died as a result of multiple gunshot wounds.

The evidence presented against Meadows at trial was admittedly circumstantial. According to witness testimony, Meadows engaged in a physical altercation with Hairston at her place of employment on November 28, 1979. During that incident, he struck both Hairston and another employee with whom he accused her of having an affair. He also threatened them with a knife and allegedly stated that "I'm not through with you all yet."

Later that same day, Meadows borrowed a 1975 blue Chevrolet Caprice from a friend, Veronica Finney. Finney subsequently testified that Meadows returned her automobile at either 7:20 p.m. or 8:20 p.m. She further testified that Meadows remained at her ho
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Other witnesses testified that they had seen Hairston's automobile parked along the road early in the evening of November 28. Witnesses also testified to observing a car resembling the one borrowed by Meadows parked behind Hairston and to hearing a woman scream as well as two gunshots. Buckshot, blood of Hairston's type, her glasses, and a button from her blouse were all discovered near the site where the two cars were seen.

Meadows' defense at trial relied primarily upon an assertion of alibi. In addition to Finney's testimony that Meadows had returned to her home by 8:20 p.m., the defense also presented a witness who testified to having seen Hairston at a nearby train station between 8:40 and 8:55 p.m. The defense also relied upon the State's inability to establish with any precision the time of Hairston's death.

As the case was presented to the jury, the trial court gave the following instruction on the issue of alibi:

> The Court instructs the jury that while the burden of proving an alibi is on the defendant, on account of its affirmative nature, this does not dispense with the necessity the state proving the actual presence of the defendant at the place where, and at the time when, the crime was committed, and if from the evidence the jury has a reasonable doubt as to the presence of the defendant at the place where, and at the time when, the offense was committed, they should acquit him.[1]

Following his conviction, Meadows filed an appeal with the West Virginia Supreme Court of Appeals in May, 1982. In the interval between Meadows' trial and the filing of his appeal, this Court decided the case of *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.1982). In *Adkins* we affirmed the grant of habeas relief to a West Virginia petitioner on the ground that an alibi instruction given at his trial unconstitutionally shifted the burden of proof on an essential element of the crime from the state to the defendant.[2] Of particular significance to this appeal, we also held that habeas relief was not procedurally barred by the petitioner's failure to object to the instruction at trial because West Virginia did not apply a contemporaneous objection rule to a "constitutional or jurisdictional challenge." *Adkins*, 674 F.2d at 282.

On direct appeal, Meadows raised five issues with regard to his conviction. Surprisingly, however, he did not present any objections to the jury instruction on alibi based upon our decision in *Adkins*. Meadows' conviction was subsequently affirmed by the West Virginia court in *State v. Meadows*, 304 S.E.2d 831 (W.Va.1983). Although the dissenting opinion in *Meadows* questioned the constitutionality of the jury instruction, there is no indication that the majority considered the issue which had been neither briefed nor argued.

In December, 1984, Meadows sought post-conviction relief through a state habeas corpus petition filed with the Mercer County Circuit Court. In this petition, he asserted for the first time, a claim that the jury instruction given at his trial was unconstitutional. The Circuit Court, under the mistaken assumption that the claim had been addressed on direct appeal and, thus, was not subject to relitigation under West Virginia law, dismissed the petition.

1. The instruction given at Meadows' trial was a variant of the alibi instruction approved by the West Virginia Supreme Court of Appeals in *State v. Alexander*, 245 S.E.2d 633 (W.Va.1978). The instruction was given in response to the defense's request. The State objected to any alibi instruction on the ground that the evidence was insufficient to raise a valid jury question on that issue.

2. The instruction at issue in *Adkins*, which was strikingly similar to the instruction given at Meadows' trial, stated that:

> The Court instructs the jury that where the state has established a prima facie case and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused.

Rather than appealing the dismissal, Meadows filed an original habeas petition with the West Virginia Supreme Court of Appeals. Following its normal practice with regard to initial habeas petitions, the court refused to grant a writ. The refusal, however, was without prejudice to Meadows' right to refile the petition in Circuit Court.

At this juncture, Meadows abandoned any further effort at pursuing state remedies. On July 5, 1985, he filed a petition for habeas relief pursuant to 28 U.S.C. § 2254 with the district court raising the alleged instructional error as one of seven grounds justifying post-conviction relief. All of Meadows' claims except that based on the jury instruction were dismissed. The remaining claim was referred to the magistrate for a report and recommendation.

In a report issued on July 11, 1986, the magistrate recommended that habeas relief be granted. After considering the timely objections presented by the State, the district court adopted the magistrate's findings. The court concluded that, notwithstanding the State's effort to distinguish the instruction at Meadows' trial from that at issue in *Adkins*, both instructions suffered from the same constitutional infirmity. The district court rejected an effort by the state to assert a bar of procedural default based upon Meadows' failure to object at trial, reasoning that *Adkins* was controlling authority on that question. Finally, the court found no merit in the State's somewhat belated assertion that Meadows had failed to exhaust available state remedies.[3] Accordingly, the court ordered that the State of West Virginia either release Meadows from custody within ninety days or retry him.

A timely appeal to this Court was filed by the State. The relief ordered by the district court has been stayed pending resolution of the appeal.

II.

On appeal, appellant's principal contentions are essentially identical to the objections to the magistrate's report presented to the district court. The State argues that the alibi instruction given at Meadows' trial is distinguishable from the instruction in *Adkins* and thus, did not render petitioner's trial fundamentally unfair. The State also contends that Meadows has not totally exhausted available avenues of state post-conviction relief. Finally, the State contends that petitioner's failure to object at trial to the form of the alibi instruction amounts to a procedural default that precludes habeas relief. In support of the latter contention, the State argues that more recent decisions of the West Virginia Supreme Court of Appeals demonstrate that our assessment of the West Virginia contemporaneous objection rule articulated in *Adkins* was flawed. We find appellant's argument on the issue of procedural default both persuasive and dispositive.[4]

[1] The doctrine whereby a criminal defendant's failure to observe a state contemporaneous objection rule operates as an "adequate and independent state ground" that bars habeas relief is a "well-established principle of federalism." *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977). Moreover, the deference thereby accorded a contemporaneous objection rule in federal habeas proceedings is more than merely a matter of comity. Rather, it is an implicit recognition of the fact that a procedure which encourages a timely consideration of all issues relevant to a criminal prosecution has substantial independent value.[5]

3. The State initially conceded that Meadows had exhausted his remedies under state procedure. It subsequently argued, however, that the West Virginia Supreme Court's refusal, without prejudice, of his original petition left further remedies available.

4. Our resolution of this question renders consideration of the State's remaining contentions unnecessary.

5. In *Wainwright*, *supra*, the Court observed that when a defendant has been accused of a serious crime, it is important that:

> To the greatest extent possible all issues which bear on this charge should be determined in

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Obviously, if a state either does not have or does not enforce procedures which require timely objection to alleged trial errors, the subsequent consideration of a habeas petitioner's claims does not undermine the societal interest in promptly resolving all issues attendant to a criminal prosecution. Neither does federal habeas review under such circumstances imply "disrespect for the State by entertaining the claim." *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979).

[2] A decision in a federal habeas proceeding that a state does not require contemporaneous objection is, however, a significant determination. The effect is to substantially diminish the concept of finality in the operation of the state criminal justice system. It is, therefore, a conclusion that should not be reached lightly or without clear support in state law.[6] Upon reconsideration, we now conclude that our analysis in *Adkins* did not satisfy that standard.

[3] When we examined the issue of procedural default in *Adkins*, we acknowledged that no decision of the West Virginia Supreme Court of Appeals had been rendered that was "precisely dispositive" of the question. 674 F.2d at 282. We, therefore, relied upon dicta from *Spaulding v. Warden*, 158 W.Va. 557, 212 S.E.2d 619 (1975), to guide our deliberations. In *Spaulding*, the West Virginia court noted that while certain trial errors asserted by a state habeas petitioner may have had merit, they had

> no constitutional or jurisdictional basis which would render the conviction void or subject to collateral attack; they were, therefore, lost to the defendant by his failure to file notice of intent to appeal as required by Code, 1931, 58–5–4, as amended. Code 1931, 53–4A–1 as amended. See *Ford v. Coiner*, [156] W.Va. [362] 196 S.E.2d 91.

Reasoning from the obverse of the *Spaulding* dicta, we concluded that West Virginia did not require rigid compliance with procedural rules with regard to errors of constitutional or jurisdictional magnitude.

Although our conclusion in *Adkins* was not inherently unreasonable, a further examination of West Virginia law now convinces us that one ambiguous sentence from *Spaulding* cannot bear the weight we have previously assigned to it. We note initially that *Ford v. Coiner, supra*, cited as controlling authority for the statement in *Spaulding*, analyzed the issue of procedural default under the relevant West Virginia statute without distinguishing between constitutional and non-constitutional errors. It is difficult to reconcile a bifurcated interpretation of *Spaulding* with the unified doctrine articulated in *Coiner*.

More recent case law has suggested even more decisively that the application of contemporaneous objection and procedural default in West Virginia is not depepdent upon the nature of the asserted error. In *State v. Kopa*, 311 S.E.2d 412 (W.Va.1983), the court concluded, in conformity with our decision in *Adkins*, that treating alibi as an affirmative defense was an unconstitutional shift of the burden of proof. Significantly, however, the court also held that the improper instruction could only be challenged in "cases currently in litigation or on appeal *where the error has been properly preserved at trial.*" 311 S.E.2d at 422 (emphasis added).[7]

this proceeding; the accused is in the court room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
433 U.S. at 90, 97 S.Ct. at 2508.

6. In *Ulster, supra*, the Supreme Court exhaustively examined both the statutory formulation of the New York contemporaneous objection rule as well as the application of that rule in numerous judicial decisions before concluding that a habeas petition was not barred by procedural default. 442 U.S. 150–154, 99 S.Ct. at 2221–23.

The existence of stringent rules governing procedural default strongly implied in *Kopa* was further buttressed by the decision in *State v. Hutchinson*, 342 S.E.2d 138 (W.Va.1986). The court therein declined to consider on direct appeal an allegedly erroneous jury instruction on alibi in the absence of a timely objection at trial stating that:

> It is implicit in decisions of this Court that the Fourth Circuit takes us further than we have desired to go in its perception of our application of the contemporaneous objection rule to potential errors of constitutional magnitude. Recently we refused to address a claimed error in the cross-examination of a criminal defendant related to his post-arrest silence. *State v. Acord*, — W.Va. —, 336 S.E.2d 741, 745 (1985). Although the error may have been of constitutional dimension, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977); *State v. Grier*, — W.Va. —, 338 S.E.2d 360 (1985); *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), we did not address the issue in *State v. Acord*, supra, because of the failure to object.

342 S.E.2d at 142–43. The court in *Hutchinson* further observed that:

> although this Court may, under Rule 30 of the West Virginia Rules of Criminal Procedure, notice plain error in the giving of an erroneous instruction (in the absence of a proper and timely objection at trial), this Court will not ordinarily recognize plain error under such circumstances, even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial.

Id. at 143.

After *Hutchinson*, there can be absolutely no doubt that West Virginia will not consider on direct appeal any but the most egregious constitutional error unless there has been a timely objection made at trial. It is distinctly unreasonable to suggest that compliance with rules of contemporaneous objection is required in West Virginia for direct appeal but excusable in a petition for habeas relief. We are also unpersuaded by appellee's suggestion that *Kopa* and *Hutchinson* are reflective only of the present state of the law and that the scope of procedural default at his trial in 1981 was controlled by the more permissive rationale of *Spaulding*. Nothing in *Kopa* or *Hutchinson* suggests that new law was being articulated. Indeed, the explicit statement of the court in *Hutchinson* that "the Fourth Circuit takes us further than we have desired to go" clearly implies that any alterations in West Virginia law have flowed entirely from our decisions.

After a thorough examination of the decisions of the West Virginia Supreme Court of Appeals, we are now convinced that West Virginia has always treated a failure to object to trial errors as a default of any right to assert these errors on direct appeal or in habeas review. Our contrary determination in *Adkins v. Bordenkircher* is expressly overruled.[8] It follows, therefore, that the State was entitled to offer the conclusive defense of procedural default in response to Meadows' habeas petition unless petitioner could establish both "cause and prejudice" for his conceded failure to object to the alibi instruction at trial.

[4] Normally a remand to the district court for consideration of the issues of "cause and prejudice" under *Wainwright, supra*, would be appropriate at this juncture. We find that course unnecessary, however. The record unequivocally discloses that any effort by Meadows to establish a sufficient "caus
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7. The court's statement was admittedly made in the context of a discussion of retroactivity rather than in an analysis of the contemporaneous objection rule. There is, however, a clear conceptual similarity between the two issues. Both doctrines deal with the extent of a criminal defendant's right to assert post-trial an error allegedly committed during previous criminal proceedings. Certainly the statement in *Kopa* is at least as instructive on the state of West Virginia law as the *Spaulding* dicta.

8. We emphasize that *Adkins* is overruled only to the extent that it addressed the issue of procedural default in the State of West Virginia. The rejection of burden-shifting jury instructions expressed therein is unaffected by our decision today.

9. Our decision in *Adkin*
ples articulated in *Sam*
U.S. 510, 99 S.Ct. 2450
Patterson v. New York,

lish a sufficient "cause" for his procedural default would be unavailing and futile. Although the treatment of alibi as an affirmative defense was still an accepted part of West Virginia criminal practice in 1981, a constitutional challenge to that practice would clearly have had a "reasonable basis." *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). Indeed, our rejection of the alibi instruction in *Adkins* rested squarely upon Supreme Court authority that was fully established by 1979.[9] The failure of competent counsel to challenge the constitutionality of the alibi instruction in 1981 can only be construed as a tactical decision to which the petitioner is now bound. *Reed*, 468 U.S. at 13, 104 S.Ct. at 2909.

III.

For the foregoing reasons, we conclude that failure to observe the requirements of contemporaneous objection at trial is an "adequate independent state ground" for denying habeas relief in the State of West Virginia. We further conclude that there can be no valid "cause" shown for petitioner's procedural default in this instance. Accordingly, we reverse the order of the district court granting Meadows' habeas petition and remand with instructions that the petition be dismissed with prejudice.

REVERSED AND REMANDED

MURNAGHAN, Circuit Judge, dissenting:

On April 17, 1981, David Meadows was tried and found guilty by a West Virginia jury of first degree murder. The charge given to the jury was one which was admitted by the majority, as well as believed by me, to be constitutionally insufficient since it wrongly placed the burden on the defendant with respect to the defense of alibi.

However, Meadows did not raise the point in the trial court, and the majority has ruled that his failure to do so brought into play the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that, in the absence of a showing of cause and prejudice by the defendant, a failure to raise the point constituted a waiver thereof.

In the first place, an adequate showing of cause is made where, as here, the *Wainwright v. Sykes* rule is shown to be an unduly demanding requirement. Here at the time of the trial the instruction to the jury was consonant with customary practice in the trial courts of West Virginia. *See State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978). So counsel for the defendant could reasonably have concluded not to object for an objection would have been useless and would have possibly run the risk of irritating the trial judge. Such a futile exercise is not required. *Perry v. Blackledge*, 453 F.2d 856 (4th Cir.1971).

Cessante ratione cessat ipsa lex. When the case reached the West Virginia Supreme Court, the question of the constitutional infirmity of placing the burden of proving the alibi d[e]fense on the defendant must, despite the [fa]ilure of defendant to raise it, nevertheles[s] have been considered by the court, for a [pre]sent specifically cited and relied particularly on the point that burden of proof had been improperly allocated to the defendant instead of the prosecution.

> [T]he instructions were infirm because the particular alibi instruction offered by Meadows has been found to impermissibly shift the burden of proof to a defendant.

State v. Meadows, 304 S.E.2d 831, 842 (W.Va.1983) (Harshbarger, J., dissenting). The rationale explaining *Wainwright v. Sykes* is that a question should be preserved so that it will receive the benefit of full consideration. It seems extremely unlikely to me that Judge Harshbarger, the dissenter, would have expressed himself so

9. Our decision in *Adkins* drew upon the principles articulated in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); and *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

cogently on the subject without having fully apprised himself of its implications.[10]

Indeed, it may well be that this entire case has proceeded on a misunderstanding of what took place at the time of the appeal reported in 304 S.E.2d 831 (W.Va.1983). On appeal, Meadows, not having done so in the trial court, specifically raised the point that "the trial court erred in refusing to give appellant's Instruction No. 21 to the jury, regarding the necessity of the state to prove the appellant's presence at the scene of the crime beyond a reasonable doubt." If, indeed, the West Virginia court then considered *Wainwright v. Sykes* to be applicable, it is surprising that it did not say so, but instead proceeded to consider on the merits the correctness or fallaciousness of the alibi instruction. At pages 839 and 840, the court considered the matter on its merits:

> Because we find appellant's Instruction No. 21 to be repetitious of his Instruction No. 16, we hold that the trial court properly refused to give the instruction.

Erroneously holding that instruction to be satisfactory because it was repetitious of another erroneous instruction is very different from refusing to consider the correctness of the instruction at all on grounds that the point has been waived. The point of the incorrectness of the burden of proof on alibi allocation was raised and considered in the West Virginia appellate court. Hence, to proceed on the grounds that the point was not raised and, therefore, was waived, seems to me a most egregious error by the majority.

Elsewhere in the opinion, the West Virginia Supreme Court of Appeals indicated it was relying on the rule that, on appeal, a jury finding of guilt will be upheld if any reasonable set of facts appears to have been before the jury. Here, however, the question is not what *correct* instructions will be affirmed by the appellate court, but rather would an *incorrect* instruction to the trial jury nevertheless be affirmed.

In the second place, regardless of whether Meadows can show cause and prejudice for his failure to object to the alibi instruction, *Wainwright v. Sykes* should not apply because West Virginia did not require contemporaneous objections to constitutional errors at the time of his trial.[11]

The case of *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.1982), *cert. denied*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), followed hard on the heels of the trial court's decision in the instant case and saw light of day before the appeal decision in the instant case was handed down. Trial actually took place in the instant case in April of 1981, less than one year before *Adkins* was decided, making the *Adkins* case even more pertinent. In *Adkins v. Bordenkircher*, although there had been no challenge below, the court affirmed a grant of *habeas corpus* to a West Virginia petitioner on the ground that an alibi instruction unconstitutionally shifted the burden of proof on alibi, the absence of which was an essential element of the crime, from the state to the defendant. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The rationale of the Fourth Circuit decision was that, in West Virginia, according to then extant authority, a failure to raise at trial a point of constitutional significance would not be deemed a waiver of the right to raise the

10. *Cf. Spaulding v. Warden*, 158 W.Va. 557, 212 S.E.2d 619, 624:

> The State properly recognized this on appeal, and the case must be reversed for this obvious reason.

11. *See Spaulding v. Warden, supra*, 212 S.E.2d at 621, 624:

> While there may be merit to some of these alleged errors, most of them have no constitutional or jurisdictional basis which would render the conviction void or subject to collateral attack: they were, therefore, lost to the defendant by his failure to file notice of intent to appeal as required by Code, 1931, 58-5-4, as amended. Code, 1931, 53-4A-1, as amended.
>
> Despite the fact that counsel made no specific request, both *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 669, and *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, impose a mandatory duty upon the trial court to hear the evidence and determine the voluntariness of a confession out of the presence of the jury prior to its introduction into evidence. This rule of constitutional law is so well established that it calls for little discussion.

point subsequently. *Adkins v. Bordenkircher*, 674 F.2d at 232; *see Spaulding v. Warden*, 212 S.E.2d at 621.

Later, as the majority attempts to show, the West Virginia Supreme Court itself expressed disenchantment with the rule in *Adkins v. Bordenkircher*, though it had not sought to do so in the *Meadows* appeal. Subsequent opinions indicate that, *in a case now arising at the trial level*, the doctrine of *Wainwright v. Sykes* would apply to constitute a waiver if the point were not raised. *See State v. Hutchinson*, 342 S.E.2d 138, 142–43 (W.Va.1986); *State v. Kopa*, 311 S.E.2d 412, 422 (W.Va.1983). However, there still remains the question, vital in the present case, of whether West Virginia was indicating that there was merely a change in the law or that the law of West Virginia had always been that a waiver would be found to have taken place upon the failure to object in the trial court. If there was a change in the law, the change occurred only after *State v. Kopa* was decided on December 15, 1983, and Meadows' lawyer would not have had to raise his objection in the trial court in 1981. On the other hand, if West Virginia was stating that the West Virginia law had always been that a waiver would be found to have taken place upon failure to raise the point in the trial court, then *Adkins v. Bordenkircher* was wrongly decided from the very instant that the opinion first saw the light of day. The court had conspicuously not taken the opportunity to say so when *State v. Meadows* was decided on June 22, 1983.

With all due respect, I find it incorrect to state that *Adkins v. Bordenkircher* was always wrong and should be overruled retrospectively as well as prospectively. Lawyers, including judges, are always taught to look at and respect opinions rendered, especially if recently rendered, by a court having jurisdiction. The lawyer representing Meadows can hardly be faulted for not raising the point and should not be held to have committed waiver when the Fourth Circuit Court of Appeals, in an admirably and convincingly argued opinion only a year later, ruled that a failure to raise the point at trial would not have such disastrous consequences. Such authority as was then in existence in West Virginia was convincingly relied on by Judge Albert Bryan in his opinion in *Adkins v. Bordenkircher*, and I, for one, find I am unable to conclude that he erred.[12] *State v. Meadows* itself so indicates.

For the period of time after the decision in *Adkins v. Bordenkircher* and before the West Virginia court undertook the task of changing the law, defendants certainly had the reasonable expectation that *Adkins v. Bordenkircher* would apply. How is it possible to fault a lawyer representing a defendant for not raising the *Mullaney v. Wilbur* point at trial when respected authority, namely, the United States Fourth Circuit Court of Appeals, had ruled that it was not necessary that he do so? While lawyers are expected to devote full intelligence and exhaustive effort to their conduct of a defense, they are not expected to achieve miracles. Any lawyer in the place of Meadows' counsel, certainly after *Adkins v. Bordenkircher* was decided, until the West Virginia court changed its law, would have to be excused for not raising the *Mullaney v. Wilbur* point at the trial. To rule otherwise would make the practice of law abound, as the only method of self-protection, in recital of frivolous non-valid matters, for how could counsel say what was clearly not the law today would not become the law tomorrow? *See Ross v. Reed*, 704 F.2d 705, 708–09 (4th Cir.1983),

12. The majority does not undertake completely to eradicate the rationale of *Adkins v. Bordenkircher*. It states that "West Virginia will not consider on direct appeal any but the most egregious constitutional error unless there has been a timely objection made at trial." Is the error here "merely" egregious constitutional error, "more" egregious constitutional error, or "most" egregious constitutional error? To a man on trial for first degree murder, any viable defense must be "most" important. Therefore, the giving of the clearly erroneous instruction would seem to me to be "most" egregious. Obviously it was constitutional error dealing with the well-established rule that constitutionally the prosecution must assume the burden of proof of every essential element of the crime.

aff'd, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984):

> If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable....
>
> Since the question was novel and since counsel had no reasonable basis for asserting the constitutional claim on appeal, we conclude that there was cause for the failure to present it on appeal as well as prejudice from the instruction itself.

After the West Virginia court had announced the change in the law making it necessary that counsel raise the point at trial, it is obvious that a lawyer could be faulted for not raising the point. However, there is a narrow time period involved here. In the first category are cases following *Adkins v. Bordenkircher* before the rule in *Adkins v. Bordenkircher* was changed. I do not really understand the majority to mean to say that those lawyers would be held to have failed to perform their duties adequately. In the second category are cases decided even before *Adkins v. Bordenkircher*. When a lawyer is astute enough to foresee what a court of final authority is going to hold, he should not be faulted, I submit, when he does so successfully. That is what Meadows' counsel achieved here.

In the third category are cases decided after West Virginia's highest court has changed the law making *Wainwright v. Sykes* applicable unless the point was adequately preserved in the trial court. As to such a case in the third category, the result reached by the majority here would seem altogether correct, and I should not be moved to dissent. Time, however, is a fourth dimension and where in time's spectrum a case appears may make a difference. There is the very narrow first and second categories of cases in the transition period where the West Virginia Supreme Court change in the law had not yet been announced. The cases are few in number, but the paucity of such defendants does not excuse the denial to them of just treatment. Especially is that true in such a case as the present one where the defendant was on trial for first degree murder.

To address the issues presented in even a narrower way, consider that the majority has ruled that there should be no remand to consider issues of cause and prejudice. The majority reasons that in 1981, under West Virginia criminal practice, a constitutional challenge at the trial court level on the grounds here implicated would clearly have had a reasonable basis.[13] The lawyer representing Meadows was held to have bound Meadows by his failure to challenge the constitutionality of the alibi instruction placing the burden on Meadows. The hamstringing of Meadows' lawyer, and, through him, Meadows himself, hardly squares with the opinion in *Honeycutt v. Mahoney*, 698 F.2d 213 (4th Cir.1983).

There *Mullaney v. Wilbur* was following its course through the courts. The district court, in a landmark decision by Judge Gignoux, had held that an analogous self-defense instruction should have placed the burden of proof on the prosecution. In all likelihood, a lawyer in one of the states for the Fourth Circuit should not have to keep abreast of every district court decision in the United States. However, the First Circuit Court of Appeals also had affirmed Judge Gignoux. *Wilbur v. Mullaney*, 473 F.2d 943 (1st Cir.1973). Then the trial in *Honeycutt* took place, and a year later the

13. The majority is apparently overlooking the fact that *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978) was controlling and that alibi instructions similar to the one given in the instant case had consistently been upheld by the Supreme Court of Appeals of West Virginia. Therefore, it is clear that any objection would have been futile.

Supreme Court ruled that Judge Gignoux and the First Circuit had both been correct. The majority of the Fourth Circuit in *Honeycutt v. Mahoney*, 698 F.2d at 217, held that there was no obligation on the part of counsel to anticipate and to raise, under risk of a waiver determination should he fail to do so, a point which had not been finally decided by the United States Supreme Court.[14] Here we have a point certainly not finally raised and decided in the West Virginia Supreme Court, with the indications that did exist all strongly pointing against the determination made in *Adkins v. Bordenkircher*. Consequently, I find it most perplexing to hold the lawyer who represented Meadows to have decided, or to be held that he should have decided, that by not objecting he was waiving the point.

The point on the merits was so compelling and straightforward application of it would have clearly demonstrated the fault of the instruction. It is hard to imagine Meadows' lawyer making a "tactical decision" which would have justified his failure to raise the point if he had any—indeed every—reasonable expectation that it would be held valid. He only failed to raise the point because of its then justifiably perceived hopelessness. Therefore, at the very least, a remand for consideration of the issues of "cause and prejudice" under *Wainwright v. Sykes* is called for.

In summary, due to the time at which Meadows was tried, he should be allowed the benefit of the decision in *Adkins v. Bordenkircher*. Consequently, the grant of *habeas corpus* by the district court should be affirmed. Alternatively, the case should be remanded to permit investigation of whether there existed cause and prejudice.

Judge PHILLIPS and Judge SPROUSE join in this dissent.

14. In *State v. Hutchinson*, 342 S.E.2d 138, 142 (W.Va.1986), a lawyer neglected to find a controlling authority, the opinion in *Adkins v. Bordenkircher*. That was held not to constitute ineffective assistance of counsel.

15. As Judge Murnaghan's dissent demonstrates, Meadows in his direct appeal did raise the question of the constitutionality of the charge, and it was considered by the West Virginia Supreme Court. Indeed the Circuit Court of Mercer County dismissed Meadows' state habeas petition because it concluded that Meadows' objection to the instruction had already been decided on direct appeal.

WINTER, Chief Judge, dissenting:

I concur in Judge Murnaghan's well-reasoned and persuasive dissenting opinion. I think that he conclusively demonstrates the error in the majority's reasoning. I am constrained, however, to add some additional comments of my own.

I.

In its appeal, the state advances several reasons why the judgment of the district court should be overturned. One is that Meadows has not exhausted available state avenues of post-conviction relief. While I believe that the petitioner has properly exhausted his remedies under state law,[15] I am disturbed by the majority's failure to address this issue when it decides to dispose of the case by its ruling on the state's contemporaneous objection rule. By doing so, the majority derogates from the proper authority of the state courts.

A state prisoner ordinarily may not obtain habeas corpus relief from a federal court unless he has exhausted the remedies available to him under state law. 28 U.S.C. § 2254(b), (c). The exhaustion requirement applies to each claim presented in federal habeas. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The purpose of the exhaustion requirement is to accommodate the role of the states in the federal system by giving the state courts an opportunity to review and correct alleged violations of federal constitutional rights. *Wilwording v. Swenson*, 404 U.S. 249, 250, 92 S.Ct. 407, 409, 30 L.Ed.2d 418 (1971); *Picard v. Connor*, *supra*.

Ignoring the question of whether Meadows has exhausted his state remedies, the majority proceeds to decide an important issue of state law. I view that as an improper judicial approach. We must first decide if there has been exhaustion because

when we have determined in a proper case that state remedies have not been exhausted, federal principles require us to avoid "any implication as to the merits of so delicate a subject" as an interpretation of state law. *Slayton v. Smith*, 404 U.S. 53, 92 S.Ct. 174, 30 L.Ed.2d 209 (1971). In *Slayton*, for example, the Supreme Court criticized us because we had expressed a view on the merits of a sensitive issue of state administration of the state courts following our finding that state remedies had not been exhausted. The majority's decision of an issue of state law in this case, without resolving whether the plaintiff has exhausted his state post-conviction remedies, likewise fails to give due deference to principles of federalism. Such an approach encourages other federal courts to reach out and touch upon issues of state law without due regard to the authority of the state courts. Indeed, the majority opinion's purported adherence to the finality of criminal convictions has an empty ring if we may decide cases without resolving whether state remedies have been exhausted.

This derogation from the authority of the state courts is aggravated by the fact that the majority's holding in this case *cannot* be reconciled with a finding that the defendant exhausted his state remedies. The majority's opinion, viewed in the light of the state's contention about non-exhaustion, is internally inconsistent. The majority concludes that the defendant failed to raise the issue of the improper alibi instruction on direct appeal, and that this was "a tactical decision to which the petitioner is now bound." The remaining avenue of exhaustion was through state habeas procedures which the petitioner did pursue in original petitions to the circuit court and the Supreme Court of Appeals. These respective courts rejected both habeas petitions without mention of the state's contemporaneous objection rule. If these original petitions failed to exhaust the petitioner's state remedies, as the state contends, then it is clearly improper for the majority to address the merits of the contemporaneous objection issue. If those petitions were exhaustive as decisions on the merits of the petitioner's constitutional claim, the state courts' decision not to base dismissal of the petitions on the state's contemporaneous objection rule means that this bar is not available as a defense against federal habeas relief.

It is well established that if a state court ignores a procedural default and decides a claim on the merits, habeas relief is not barred due to such default. *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985); *Ulster County Court v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); *Baker v. Muncy*, 619 F.2d 327, 329 (4 Cir. 1980). Because a state contemporaneous objection rule prohibits federal habeas review only if that procedural bar is an adequate and independent state ground for the decision of a state court, the rule barring habeas relief due to procedural default is only available where it is clear from the plain language of the state court's opinion that procedural default was a reason for the decision. *Id.*[16] *See Michigan v. Long*, 463 U.S. 1032, 1040–41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983) (no independent state ground exists where the "adequacy and independence of any possible state law ground is not clear from the face of the [state court's] opinion"). Because the independence of any procedural ground for the state court's decision is not apparent from the four corners of the opinions of the West Virginia courts which exhausted the petitioner's state remedies in this case, application of the state contemporaneous objection rule is therefore not proper here. *Id.*[17]

16. *See also Walker v. Engle*, 703 F.2d 959, 966 (6 Cir.1983); *Bell v. Watkins*, 692 F.2d 999 (5 Cir. 1982), *cert. denied sub nom. Bell v. Thigpen*, 464 U.S. 843, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983); *Henson v. Wyrick*, 634 F.2d 1080 (8 Cir.1980), *cert. denied*, 450 U.S. 958, 101 S.Ct. 1417, 67 L.Ed.2d 383 (1981); *Quigg v. Crist*, 616 F.2d 1107 (9 Cir.1980), *cert. denied*, 449 U.S. 922, 101 S.Ct. 323, 66 L.Ed.2d 150 (1980); *Brinlee v. Crisp*, 608 F.2d 839 (10 Cir.1979), *cert. denied*, 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980).

17. A few cases have not required a plain statement by the state courts of the procedural

II.

On the merits of this case, I would affirm *Adkins* as the correct interpretation of West Virginia law in 1981 regarding the requirement of a contemporaneous objection to a constitutional error for the reasons advanced by Judge Murnaghan. Due to the harmless error rule of *Rose v. Clark*, 478 U.S. ——, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460, 474 (1986), the effect on the administration of justice from *Adkins* would not be great. Although this case is not one,[18] there are many cases in which an error is harmless beyond a reasonable doubt. Reaffirming our holding in *Adkins* also is supported by the fact that in this case neither the circuit court nor the Supreme Court of Appeals in West Virginia applied its contemporaneous objection rule to bar the petitioner's state habeas claim, thus raising an inference that no such rule applied at the time of Meadow's trial. *Ulster County Court*, 442 U.S. at 152–54, 99 S.Ct. at 2222–23. Finally, reaffirming *Adkin's* holding is also necessary because the West Virginia Supreme Court's later interpretation of the contemporaneous objection rule manifestly applied a stricter interpretation of that rule for the purpose of frustrating federal law regarding the alibi instruction. We should not hasten to apply this new state rule retroactively.

We must not overlook that the basis for upholding the primacy of federal law against an uncertain interpretation of a state procedural bar is firmly established. Nonetheless, the majority chooses to apply the contemporaneous objection rule as the state has urged. The court bases its holding on its view that:

> A decision in a federal habeas proceeding that a state does not require contemporaneous objection is, however, a significant determination. The effect is to substantially diminish the concept of finality in the operation of the state criminal justice system. It is, therefore, a conclusion that should not be reached lightly or without clear support in state law. Upon reconsideration, we now conclude that our analysis in *Adkins* did not satisfy that standard.

(Op. at 497) The majority's "standard"—in effect a presumption that the state will apply a contemporaneous objection rule absent a clear statement by the state courts to the contrary—directly contradicts the Supreme Court's decision in *Ulster County Court v. Allen*, *supra*. In that case, the Court reviewed New York law to determine whether the courts of that state apply

grounds for their decision, but these cases predate *Michigan v. Long* which requires such a plain statement in order for a ruling on state law to constitute adequate and independent state grounds. *E.g. Gruttola v. Hammock*, 639 F.2d 922, 929 (2 Cir.1981). *But see Klein v. Harris*, 667 F.2d 274, 285 (2 Cir.1981).

18. In this case the evidence against Meadows was circumstantial, and his presence at the scene of the crime was the key issue. The evidence bears repetition:

> The murder victim Ms. Hairston, with whom Meadows was romantically involved, was killed on the evening of November 28, 1979, but the time of her death was a fact of some dispute. *State v. Meadows*, 304 S.E.2d at 837. Witnesses identified an automobile which Meadows had borrowed as being parked at the scene of the murder on that evening. *Id.* Earlier that day, Meadows had a fight with the murder victim. *Id.* at 834. The evidence indicated that several hours after the murder, the murderer returned to the scene of the crime and used the victim's car to transport her body to a secluded location where the body was later found. *Id.* at 837. The victim's car was observed near her home the following morning.
>
> On November 29, the victim was reported as missing. Meadows told a witness that day that he knew the whereabouts of the victim's car; nonetheless, he participated in a search for the car the following day with the victim's cousin without mentioning this fact. *Id.* at 835. On December 1, Meadows reported that he had found the car. Meadows had a set of keys to the car that may have been the original set that belonged to the victim. *Id.* at 835–36.
>
> Meadows' defense at trial was that he was at the home of Veronica Finney watching television when the murder occurred. Ms. Finney testified that Meadows had returned to her home at 7:20 or 8:20 p.m. and stayed under 10:30 on the night of the murder. *Id.* at 837. No witness testified that Meadows was at the scene of the crime, and the murder weapon was never found. On direct appeal, one judge from the Supreme Court of Appeals of West Virginia dissented from the conclusion that this circumstantial evidence was sufficient to prove that Meadows was at the scene of the crime. *Id.* at 841–42 (Harshbarger, J., dissenting.)

a contemporaneous objection rule in cases of constitutional level error. After determining that "New York has no clear contemporaneous-objection policy that applies in this case," the Court unanimously concluded that the petitioner's constitutional argument was properly before the Court. 442 U.S. at 149–50, 168, 99 S.Ct. at 2220–21, 2230. The majority here concludes that a similar body of unclear state law existed at the time of our decision in *Adkins*, finding that *Adkins* was "not inherently unreasonable" and that the case law on the subject was ambiguous. (Op. at 497) But, despite the fact that West Virginia law, like New York law in *Ulster County Court*, had according to the majority's view no clear contemporaneous-objection policy, the majority nevertheless concludes that it will apply a contemporaneous objection rule to bar the petitioner's constitutional claim.

The primacy of federal law in cases such as this was also considered in *Walker v. Engle*, 703 F.2d at 966–67. There, the Sixth Circuit, relying on the Court's decision in *Ulster County Court*, rejected application of a state contemporaneous objection rule where application of the rule "had no foundation in the record or state law." The court's holding was limited to the narrow situation before it:

> We do not by this holding sanction blanket federal court review of state procedural rulings, rather the rule is to ensure that the state courts do not block federal vindication of federal constitutional rights by procedural rulings that have no basis in state law.

Id. A similar set of facts exists in this case because of the uneven application of West Virginia's rule of discretion in considering constitutional errors for which no objection was made.

III.

The other aspect of the case which warrants comment is the majority's failure, without assigning any reason therefor, to remand this case for consideration of whether the instruction in this case was plain error under the majority's conception of West Virginia's current formulation of its contemporaneous objection rule. Even if I assume the correctness of the majority's interpretation of West Virginia's contemporaneous objection rule, plain error of constitutional magnitude in the giving of a jury charge is subject to review if the giving of an instruction substantially impairs the truth-finding function of the trial. *State v. Hutchinson*, 342 S.E.2d 138, 142 (W.Va.1986). To my mind, the error in this case substantially impaired the truth-finding function of the trial as a matter of federal law, because of the tenuous basis for Meadows' conviction of first-degree murder. *Cf. Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826, 17 L.Ed.2d 705 (1967) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean"). Thus, even accepting the majority's holding, I would still remand the case to the district court to consider whether the alibi instruction, on the facts of this case, was plain error.

In summary, I dissent from the majority's principal holding. I dissent from its failure to decide whether Meadows exhausted state remedies, and I dissent from the failure to remand the case to determine if there was plain error in the proceedings resulting in Meadows' conviction.

Judge PHILLIPS, Judge MURNAGHAN, and Judge SPROUSE authorize me to say that they join in this expression of my views.

PHILLIPS, Circuit Judge, dissenting:

I fully agree with the dissenting opinions of Chief Judge Winter and Judge Murnaghan, and write separately to express some added concerns about the process used by the majority to reach decision here.

The dissenting opinions of Chief Judge Winter and Judge Murnaghan convincingly demonstrate that in its zeal to overrule our panel decision in *Adkins*, thereby giving retroactive effect to West Virginia's belated announcement of an earlier contempora-

neous objection rule, the majority has had to disregard or violate several critical principles governing federal collateral review of state court convictions.

Specifically, by simply finessing the state's exhaustion argument, the majority has avoided the necessity for dealing with the awkward fact that Meadows had indeed exhausted his state remedies and that in the course of doing so the state courts had rejected on the merits, not on independent state procedural grounds, his burden-shifting constitutional argument. Even if, as the majority now holds, the state then had a contemporaneous objection rule, it either forgot about it, waived it *sub silentio*, or treated the asserted error as one of constitutional dimensions so potentially egregious that it was reviewable under an exception which the majority apparently now concedes still exists. Whatever the reason, the state courts' failures on Meadows' direct appeal and post-conviction proceedings to reject the constitutional argument on an independent state procedural ground precludes, on settled principle, our invocation of procedural default as a way to avoid collateral review of his claim on the merits.

We cannot, on any principled basis, live with such a means of invoking state court procedural defaults against habeas petitioners.

Another settled principle that falls victim to the majority's rush to undo *Adkins* is, as Judge Winter points out, that of *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), which directs that federal habeas courts should presume against rather than for the existence of state contemporaneous objection rules where the evidence of their existence (or consistent application) was *at the critical time* unclear in state law. That is exactly what Judge Bryan, writing for the unanimous panel in *Adkins* properly did. But the majority, yielding to the state's arguments, has now purported to find a clarity not perceived by the *Adkins* panel—solely in *later* retrospective pronouncements by the state court unsupported by any clear contemporary evidence. As Judge Murnaghan has persuasively shown, it simply defies rational belief that if a state contemporaneous objection rule with respect to constitutional error had actually been in general operational effect at the time of Adkins' and Meadows' trials in 1977 and 1981, respectively, its existence would not have been formally invoked or at least noted in dictum in any published decisions of the highest state court until *Kopa* was decided in December 1983.

Ulster in effect holds that, as a matter of federal law, ambiguities or lack of clarity on the point in state statutory and decisional law are to be resolved in favor of federal habeas petitioners seeking to avoid the bar of procedural default. The narrow federal question dispositively decided in *Adkins* was therefore only that state law *appeared* at the time not absolutely to require contemporaneous objection to constitutional error. To overrule that narrow holding, supported by *Ulster's* presumption, should require more than later state court decisions which, without citing any earlier decisions clearly demonstrating that such a rule then existed, simply opine that it did. Judge Bryan's perfectly accurate reading of the *then* unclear state of state law could only be overruled by disregarding the important principle of *Ulster*.

I have recapitulated the critical points already made in the dissenting opinions of Judge Winter and Judge Murnaghan to emphasize the dangerous precedential path taken by the majority in reaching its decision. While the decision only directly affects a single habeas petitioner, the majority opinion's treatment of procedural default principles has far wider implications for habeas corpus jurisprudence in this circuit (unless, the immediate problem felt by one state having been attended to, the disregard of principle in this case is now in turn to be disregarded).

Particularly disturbing is the fact that in yielding to the state's importuning to relieve it of *Adkins'* limited barrier to the invocation of procedural default, the majority has reached out much more broadly than may have been necessary to decide this appeal, seizing upon the unusual procedure of an initial en banc hearing in order to do so. Use of the en banc procedure as a specific means of first-instance reexamination of existing circuit precedent to which no intracircuit or intercircuit conflict has developed has its own dangerous implications, and I take this opportunity to record that all the dissenters in this case voted against convening an en banc court specifically to consider overruling *Adkins*.

Finally, it bears emphasis that, as Judge Winter has intimated in alluding to the harmless error possibility, and as the district court necessarily determined, the substantive claim here at issue is by no means an insubstantial one. There is a significant possibility that deliberately using this case as the vehicle for overruling *Adkins*, thereby almost incidentally allowing denial of Meadows' petition on procedural default grounds, forgives a due process violation that prejudicially affected the fact finding function in this petitioner's state trial.

If so, more than principle has fallen to this extraordinary effort by the court to relieve a state of a belatedly recognized problem in the administration of its criminal justice system.

I therefore dissent both to the procedure by which the majority has enabled itself to overrule *Adkins* and to the overruling.

Chief Judge WINTER, Judge MURNAGHAN, and Judge SPROUSE authorize me to say that they join in this expression of my views.

Wiley GOAD, Plaintiff/Appellee,

and

Nomia Goad, Plaintiff,

v.

CELOTEX CORPORATION; Eagle-Picher Industries, Inc.; Owens-Corning Fiberglass Corporation; Keene Corporation; H.K. Porter Company, Inc.; Fibreboard Corporation, Defendant/Appellant,

and

Johns Manville Sales Corporation; Armstrong Cork Company; GAF Corporation; Unarco Industries, Inc.; Pittsburgh Corning Corporation; Owens-Illinois, Inc.; Forty-Eight Insulations, Inc.; Mundet Cork Corporation; Crown Cork & Seal Company, Inc.; Raybestos-Manhattan, Inc., Defendant.

No. 86-3540.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 8, 1987.

Decided Oct. 16, 1987.

Subsequent to transfer of worker's diversity action against manufacturers of asbestos products, alleging personal injury, from Texas to Virginia district courts, worker moved for order applying Texas statute of limitations to his claim. The United States District Court for the Western District of Virginia, Jackson L. Kiser, J., granted motion and defendants appealed. The Court of Appeals, Widener, Circuit Judge, held that: (1) application of Texas statute did not violate full faith and credit clause, and (2) application of Texas statute did not violate due process.

Affirmed.

1. **Limitation of Actions** ⇐2(3)
States ⇐5½

Application of Texas statute of limitations to worker's personal injury action against manufacturers of asbestos prod-

CERTIFICATE OF SERVICE

I, E. King Poor, an attorney, hereby certify that I have this day served a copy of the Petition For Rehearing and Certificate of Counsel for Petition For Rehearing on counsel for the respondent listed below by depositing a copy of same in the U.S. mail at One First National Plaza, Chicago, Illinois with a proper address and postage.

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Dated: December 21, 1987

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April 21, 1988

BY HAND DELIVERY

Ms. Sandy Nelson
Office of the Clerk
Supreme Court of the
United States
Washington, D.C. 20543-001

Re: Harris v. Reed, No. 87-5677

Dear Ms. Nelson:

As we discussed over the telephone yesterday, I am enclosing for filing today the original and one copy of the typewritten manuscript of Petitioner's Brief. I would appreciate it if you would file stamp the copy of the brief. Also enclosed for filing is the original and one copy of the Certificate of Service indicating service on counsel for the respondents and amicus curiae.

You indicated that the galley proofs of the printed brief will be sent to us when they are completed. Please call me if you have any questions. Thank your for your assistance.

Very truly yours,

E. King Poor

EKP/mlt

enclosures

cc: Terence M. Madsen (w/encl.)
Arleen C. Anderson (w/encl.)
Judith L. Libby (w/encl.)
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George B. Christensen (w/encl.)

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No. 87-5677
IN THE SUPREME COURT OF THE UNITE
OCTOBER TERM, 1987

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

WARREN LEE HARRIS,

Petitioner,

vs.

MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, E. King Poor, an attorney admitted to practice before this Court, hereby certify that I have this day served a copy of the Brief of Petitioner on counsel for the respondents and amicus curiae as indicated below:

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RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
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CLERK

No. 87-5677

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA ex rel.
WARREN LEE HARRIS,

Petitioner,

vs.

MARVIN REED, Warden,

Respondent.

On A Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there any reason why this Court should grant review where Harris has failed to establish a conflict among the Circuits; where, if there were a conflict, the decision below is correct and should not be disturbed; and where, if the decision below is found incorrect, on this record Harris's conviction would still be affirmed?

2. Is there any reason why this Court should grant review where this Court has already fully addressed the issue of how to interpret a state court opinion that is ambiguous as to procedural default and where there is no conflict among the Circuits on this issue?

3. Is there any reason why this Court should remand this cause for a cause and prejudice hearing where Harris has failed to make a colorable claim of cause and prejudice and where the District Court's finding of no constitutional violation on the merits demonstrates that Harris could not make a showing of prejudice?

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No. 87-5677

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA ex rel.
WARREN LEE HARRIS,

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vs.

MARVIN REED, Warden,

Respondent.

On A Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner has attached to his petition copies of the state court opinion, the Seventh Circuit opinion, and the District Court's first opinion rejecting waiver and calling for an evidentiary hearing. Respondent attaches hereto a copy of the District Court's final opinion denying the petition for writ of habeas corpus on the merits.

JURISDICTION

Harris invokes jurisdiction under 28 U.S.C. §2101(c). However, the following argument demonstrates that Harris has not provided any reason for the Court to exercise its discretion to grant the petition.

STATEMENT OF THE CASE

This is an action in habeas corpus. Warren Lee Harris was convicted of murder by a jury in Cook County, Illinois in 1977 and sentenced to a term of 50-100 years in prison. His conviction was upheld on appeal against a challenge to the sufficiency of the evidence. Harris did not seek direct review in the Illinois Supreme Court.

Harris filed a state post-conviction petition alleging ineffective assistance of counsel, an issue not raised on direct appeal, and the petition was denied. On direct appeal, the denial was affirmed in an unpublished opinion that contained language of procedural default for failure to raise the claim on direct appeal and a discussion of the weakness of the claim on the merits. Harris did not seek review in the Illinois Supreme Court.

Harris filed a federal habeas petition in the United States District Court, again claiming ineffective assistance of trial counsel. Although the State urged that the failure to raise this claim on direct appeal was a procedural default, the district court found that the state appellate court in the post-conviction action had excused the default. The court conducted a three-day evidentiary hearing on the ineffective assistance question and then denied the petition on the merits.

The United States Court of Appeals for the Seventh Circuit affirmed the denial, without reaching the merits, on the ground that the state court did not excuse the procedural default.

REASONS FOR DENYING THE WRIT

1. There Is No Reason For This Court To Grant Review Where: Harris Has Failed To Establish A Conflict Among The Circuits; If There Were A Conflict, The Decision Below Is Correct And Should Not Be Disturbed; And If The Decision Below Is Found Incorrect, On This Record Harris's Conviction Would Still Be Affirmed.

Harris claims there is a conflict among the Circuits as to when to allow habeas review where the state courts have denied relief after discussing both a procedural default and the merits of the claim. He claims that, under these circumstances, the Fifth and Tenth Circuit ignore the alternate procedural default holding and address the merits because the state court addressed the merits. Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981); Braiser v. Douglas, 815 F.2d 64 (10th Cir. 1987). By comparison, the Third and Seventh Circuits do acknowledge the procedural default and bar habeas review of the merits even if the state court addressed the merits as an alternate holding. Caruso v. Zelinsky, 689 F.2d 435, 439-440 (3rd Cir. 1982). Harris asks this Court to resolve this conflict by setting a uniform habeas standard in instances where the state court relies on "twin grounds"--both state and federal grounds--for affirming a criminal conviction.

However, there is no basis for this Court to intercede for several reasons. First, there is no conflict. This Court has made it plain that when a state prisoner allegation is barred on state procedural grounds, habeas review of that claim is inappropriate. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); County Court of Ulster Cty. v. Allen, 442 U.S. 140, 99 S.Ct. 2213 (1979). Accordingly, the Circuits are in agreement that, where the state relied on the procedural default, habeas review is inappropriate even if they alternatively rejected the claim on its merits. United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 440 (3rd Cir. 1982); Phillips v. Smith, 717 F.2d 44, 48 (2nd Cir. 1983); Dobbert v. Strickland, 718 F.2d 1518, 1524-1525 (11th Cir. 1983); Shepard v. Foltz,

771 F.2d 962, 965 (6th Cir. 1985); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985); Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987).

Although Harris claims that the Fifth Circuit ignores a state court's alternate procedural default holding, this is simply not true. Just last year, the Fifth Circuit in Cook v. Lynaugh explained that:

> The rule in this circuit is that, when a state court bases its decision upon the alternative grounds of procedural default and a rejection of the merits, a federal court must, in the absence of good "cause" and "prejudice," deny habeas relief because of the procedurdal default.

Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987); Accord, Ratcliff v. Estelle, 597 F.2d 474, 475-476 (5th Cir. 1979). Harris has failed to establish a conflict among the Circuits.

Furthermore, even if there were a conflict, this is not the type of case that would be the proper vehicle for resolving such conflict because Harris could never benefit from this Court's intervention. First, in light of Sykes and Ulster County and other decisions where this Court addressed procedural default, it is clear that the Seventh Circuit's analysis is correct and would be affirmed. In other words, the decision below is correct and should not be disturbed.

Second, even if this Court decided that the decision below was not correct and remanded for review on the merits, Harris's conviction would still have to be affirmed. The district court judge who went beyond the waiver and addressed the merits found that Harris failed to establish a constitutional violation. The Seventh Circuit judge, who also went beyond the waiver and addressed the merits, concurred in the judgment on the same assessment that Harris failed to establish a constitutional violation. Thus, if this Court remanded for a determination on the merits, the Seventh Circuit would still have to deny the writ on this record. There is no basis on which Harris could ever benefit by this Court's intercession. He has failed to provide a reason why this Court should accept review.

2. This Court Has Already Fully Addressed The Issue Of How To Interpret A State Court Opinion That Is Ambiguous As To Procedural Default; Furthermore, There Is No Conflict Among The Circuits On This Issue.

Harris also claims there is a conflict among the Circuits in instances where a state court opinion is ambiguous as to whether a claim was denied because of a state procedural default or on its merits. In this case, the Seventh Circuit undertook to discern whether the state court intended to rely on a procedural default. By comparison, Harris claims that the Fifth Circuit presumes a state court addresses the merits wherever its action appears ambiguous. Henry v. Wainwright, 686 F.2d 311, 314, and n.4 (5th Cir. 1982); see also Rosenfield v. Durham, 820 F.2d 52 (2nd Cir. 1987).

First, there is no need for this Court to address the issue at all. This Court already addressed this issue in County Court of Ulster Cty. v. Allen, 442 U.S. 140, 147-154; 99 S.Ct. 2213, 2219-2223 (1979), where it established the manner in which federal courts discern whether a state court enforced an independent and adequate state procedural ground that would bar federal habeas review. In the absence of an express state court default finding, this Court examined whether the state had a procedural default provision that could have barred state appellate review of the claim raised, whether the claim raised would have fallen into an exception to the ordinary default rule, whether the prosecution argued that the claim was procedurally defaulted, and whether the state reviewing court implicitly excused any default by addressing the merits. Ulster County, 442 U.S. at 147-154; 99 S.Ct. at 2219-2223.

Second, there is no conflict on this issue at all. The Seventh Circuit, the Fifth Circuit and the Second Circuit each examine the state court record to discern whether the state enforced a state procedural ground that bars federal habeas review in the same manner--the manner established in Ulster County. For instance, in the case at bar, the Seventh Circuit noted that the Illinois appellate court did not explicitly

state that Harris's claim was defaulted but it did note that failure to present an issue on direct appeal precludes state post-conviction review unless a defendant can show it was impossible to present the claim on direct appeal. Harris, 822 F.2d at 684. It examined the record to find that all the grounds, save one, could have been raised on direct appeal. Harris, 822 F.2d at 684. Without expressly finding that all other claims were waived, the Illinois court then proceeded to a short discussion of general standards for finding a claim of ineffective assistance of counsel. Harris, 822 F.2d at 684. Next, it analyzed all the grounds and found that there was no denial of the effective assistance of counsel. Harris, 822 F.2d at 684.

The Seventh Circuit concluded that the opinion included no explicit finding of waiver nor an explicit finding of intention to ignore the waiver. Harris, 822 F.2d at 684. It was ambiguous in that it addressed the merits of some of petitioner's claims which had clearly implied were waived. Harris, 822 F.2d at 684. However, a full reading of the state court opinion demonstrated that the state intended to find that all grounds were waived except one. Harris, 822 F.2d at 684. In an alternate holding it rejected each of the claims on the merits. Harris, 822 F.2d at 684. This alternate holding did not demonstrate an intention to ignore the procedural default. Harris, 822 F.2d at 684. Therefore, Illinois' enforcement of an independent and adequate state procedural ground barred federal habeas review of Harris's claims. Harris, 822 F.2d at 684.

Similarly, in Henry v. Wainwright, the Fifth Circuit examined state court language that suggested that the Florida courts dealt with Henry's claims on the merits. Henry, 686 F.2d at 313. While this language alone did not resolve the default issue, the Fifth Circuit said its conclusion was reinforced for two reasons. Henry, 686 F.2d at 314. First, the record disclosed no procedural default whatsoever. Henry,

686 F.2d at 314. Second, state law would have required that any default be excused because, in death cases, the Florida Supreme Court exercises a special scope of review enabling the excusal of procedural default. Henry, 686 F.2d at 314. Under the "situation presented here," where the state court was ambiguous on the default question, Florida must be presumed to apply its own rules to address Henry's claim in a death case on the merits.

Harris twists this conclusion to suggest that in all habeas cases, when the state court opinion is ambiguous, the Fifth Circuit presumes that the state court addressed the merits. (Petitioner's Petition at 8-9). Actually, Henry followed Ulster County in the same manner as the Seventh Circuit in this case by examining the state court's intention to the extent possible and found it had no intention to enforce a procedural bar in the case at hand. Henry is not in conflict with this Court or any other Circuit. It is Harris who creates a conflict with an incorrect interpretation of Henry.

Furthermore, despite Harris's claim, the Second Circuit also follows Ulster County and the other Circuits. In Rosenfield v. Durham, 820 F.2d 52, 55 (2nd Cir. 1987), the Second Circuit discerned the New York court's intent by examining its opinion which never mentioned procedural default but explicitly stated that defendant's allegations did not "merit" reversal. It found no intention by New York to enforce a procedural bar.

Since this Court has already fully addressed this issue and since there is no conflict among the Circuits, Harris has not provided any reason why this Court should intercede. The petition must be denied.

3. There Is No Reason To Remand For A Cause And Prejudice Hearing Where Harris Has Failed To Make A Colorable Claim Of Cause And Prejudice And Where The District Court's Finding Of No Constitutional Violation On The Merits Demonstrates That Harris Could Not Make A Showing Of Prejudice.

Lastly, Harris asks this Court to remand this cause for an opportunity to establish cause and prejudice. But this record

clearly reflects his inability to demonstrate prejudice. A showing of prejudice to overcome a state procedural default means "actual prejudice resulting from the errors of which he complains" and "actual prejudice of a degree sufficient to justify collateral relief." United States v. Frady, 456 U.S. 152, 168, 102 S.Ct. 1584, 1594 (1982). In other words, prejudice requires the same showing of prejudice required to justify a granting of the Great Writ.

But at bar, the district court which addressed the merits of Harris's claim already determined that the writ could not issue because he failed to show both that counsel was ineffective and that he was prejudiced by counsel's performance. Again on appeal, Court of Appeals Judge Cudahy concurred on the theory that, while he would not treat the ineffective assistance of counsel issue as waived, he would affirm the district court's determination that on the merits the writ should not issue since counsel was not constitutionally ineffective. Thus, Harris's representation to this Court that he deserves an opportunity to show prejudice is useless and a waste of the federal judiciary's valuable time.

Moreover, Harris had the chance to make out a colorable claim of cause and prejudice in the lower courts, specifically in a petition for rehearing before the Seventh Circuit after its decision. He also had the chance to include a colorable claim in his petition to this Court but he hasn't. Therefore, this Court should not order a remand for a hearing where Harris fails to make a colorable claim of cause and prejudice and where this record demonstrates that he could not make a showing of prejudice.

CONCLUSION

WHEREFORE, the respondent asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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January 29, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. WARREN LEE HARRIS Petitioner,	)	
v.	)	No. 80 C 513
MARVIN REED Respondent.	)	

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This petition for a writ of habeas corpus, 28 U.S.C. §2254, is before the court for entry of findings of fact and conclusions of law. Petitioner Warren Harris alleges that he was denied effective assistance of counsel at this state court trial for murder and is therefore incarcerated in violation of the Sixth Amendment to the United States Constitution, as applied against the states through the Fourteenth Amendment. On April 8, 1985, this court denied the respondent's motion for summary judgment. That opinion is reported at 608 F.Supp. 1326. An evidentiary hearing was held over three days in November of 1985, and post-trial memoranda became fully briefed on February 26, 1986. Although this is a close and difficult case, the court determines that petitioner has not met his burden of showing that his conviction was constitutionally invalid, and therefore enters judgment for respondent.

Findings of Fact

The chief omissions of which petitioner complains concern trial counsel's failure to interview and call certain occurrence witnesses who might have identified someone other than petitioner as the assailant, and trial counsel's failure to call proferred alibi witnesses to the stand. Other trial errors are alleged as well. In order to assess the merits, a full history of counsel's pre-trial and trial performance is necessary.[1/]

1. Pursuant to a two-count information, petitioner Warren Lee Harris was charged with the murder of one Ernest ("Pete") Howard in August of 1977. Petitioner entered a plea of not guilty and Todd Musburger of the Cook County Public Defender's Office was appointed to represent him. Musburger had been with the public defender's office for about four years. Harris's case was Musburger's first murder jury trial, although he had conducted several felony jury trials. Musburger was joined by Kathryn Kuhlen as co-counsel.

2. On September 7, 1977, a preliminary hearing was conducted before the Honorable David J. Shields of the Circuit Court. The chief witness at the preliminary hearing was Antonio Slater, who testified that on July 9, 1977, at approximately

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1/ Designations to the hearing transcript are by Volume Number, (I, II, or III) and page number. References to exhibits are to petitioner's exhibits unless otherwise noted, and references to the state court trial transcript are noted as "Tr."

10:00 p.m., he was driving on the 1500 block of South Christiana Street in the City of Chicago. At that time, Slater heard a gunshot and saw a man fall to the ground. He looked around and saw another man with a pistol in his hand run to a Buick Electra and get in. Slater testified that he recognized the man as petitioner, whom he had seen periodically in the vicinity of a liquor store at 13th and Kedzie Streets, and knew as "Wayne."

3. On cross-examination, Musburger elicited that Slater did not hang out on South Christiana regularly, that Slater had turned off onto Christiana from Douglas Street, and that Slater had been stopped on the street for between 3 to 5 minutes because the Buick Electra had blocked his way. Slater testified that the man he saw running away from the victim was a 5'11" black male, weighing approximately 165 pounds, and wearing black pants and a beige knitted sweater. Slater added that Christiana has orange street-lights, but that the incident did not occur under one. Musburger attempted to elicit information as to how and when Slater first spoke to the police, but the court sustained objections to this line of questioning.

4. Pursuant to pre-trial discovery, counsel for the defense obtained copies of the police reports relative to the investigation of Howard's homicide. By virtue of these materials, counsel learned the following (the reports contained addresses and phone numbers for all witnesses):

A. Laverne Tapes, the victim's common-law wife, informed the police that the victim, Ernest Howard, was a dope dealer who usually dealt in the area of 16th and Christiana. (Ex. 39)

B. Maurice Williams was at about 16th and Christiana on July 9, 1977 when he heard a gun shot and heard Howard call his name. Howard told Williams that he had been robbed and knew the offenders, but did not mention their names. (Exs. 38, 41).

C. Betty Larry, common-law wife of Maurice Williams, informed the police immediately after the shooting that Curtiss Fowlkes had witnessed the incident and had told her that Howard's assailants were two male negroes, one of whom wore a red shirt and dark pants, and that they had fled the area driving a maroon and white 1968 Buick Electra. (Ex. 38)

D. Larry also told the police that Joanne Hightie had told her that she (Hightie) had seen two male negroes running through a playlot at 1521 S. Christiana immediately after the shooting, that one of them had on a red T-shirt with dark pants, and that the other was wearing a white T-shirt. According to Larry, Hightie had also seen a white-maroon Buick Electra 225, but the vehicle had three occupants. Larry herself recalled that at the time she had spoken to Fowlkes, a male negro wearing a white T-shirt appeared to be with Fowlkes. (Ex. 39).

E. After some initial difficulties locating him, the police interviewed Curtiss Fowlkes, who stated that he had seen Howard and a man wearing a red shirt talking near the corner of 16th and Christiana Street. Fowlkes turned away for a few seconds and heard a shot. When he turned around, he saw Howard fall to the ground and then saw the man in the red shirt enter a grey 1968 Buick Electra with chrome manifold pipes. Fowlkes described the man as being a male negro, age 25-26, 5'10" to 6' tall, with a medium build and an afro haircut. This description fit petitioner.

F. Leroy Carter, 1528 South Christiana, was also interviewed by the police. Carter indicated that he had been sitting in his car with his girlfriend (Joanne Hightie) in front of 1528 South Christiana with the radio on, the windows closed, and the air conditioner running. At about 10:00 p.m., Carter saw the described man with the white T-shirt running into the playground in a north-east direction from 16th and Christiana. (Ex. 41).

G. Rose Anderson indicated that the same man described by Carter approached her at a neighborhood tavern just before midnight, told her he had been with "Pete" at the time of the shooting, and asked if Pete had died yet. Anderson added that before she could respond, the man noted Darryl Tapes, the victim's brother-in-law, arriving,

and left hurriedly. (Ex. 40). Through Anderson's cousin, the police learned that the man was known as "Buster" and lived in the vicinity of 12th and Lawndale.

H. Clarence Gibson, a friend of the decedent, told police that on the night of the incident, he heard a shot, went outside and met "Buster" who was walking toward 16th Street. Buster informed Gibson that "Pete" had been shot, and the two men went back to the scene of the crime to watch the police carry the body away.

I. The police also interviewed Alice Marie Riles, 1515 S. Christiana, who related that she had been sitting on the front porch of her house when she heard a shot. Immediately thereafter, Riles saw two men running in a northeasterly direction and into a vacant lot near the playlot described by Carter and Hightie.

J. The police located Buster, now identified as Melvin McWhorter of 1306 S. Lawndale. McWhorter agreed to come to Area 4 headquarters for questioning, was advised of his rights, and then denied any knowledge of the shooting.

K. Both Riles and Carter, separately viewing a lineup, positively identified McWhorter as the man running through the playlot arcund the time of the shooting. (Exs. 43, 44). Upon further questioning, McWhorter stated

that he was with one George Williams (a/k/a/ "PRO") at the time of the shooting.

L. At a later date, McWhorter admitted being untruthful in his earlier interview, and related that on the evening of the homicide he and George Williams had gone to 16th and Christiana to buy narcotics. Standing in the vacant lot on the east side of Christiana, McWhorter noticed several persons on the west side of the street, including petitioner Warren Harris. McWhorter said he did not see Howard at that time, or he would have bought dope from him. McWhorter then heard a gunshot and saw Harris walking south on Christiana and then west on 16th Street away from the shooting. McWhorter further related that on Tuesday, July 12, 1977, Harris approached both him and George Williams and warned that they would be harmed if they told anyone Harris had been present when Howard was shot. McWhorter had known Harris for about four years and positively identified a photo of him.

M. On August 3, 1977, the police finally located and interviewed George Williams. Williams told the police that he and McWhorter were standing in a gangway across the street from where Howard was later found when they heard a hot. Williams walked across the street and saw the victim and numerous other persons in the surrounding area. Williams was asked if he saw Harris at the scene,

and he answered no but that he had heard from some persons in the area that Harris was the killer. (Ex. 46).

N. Through an unidentified informant, police later were informed that one Antonio Slater had witnessed the incident; Slater was located on August 19th and gave the police a written statement. This statement largely corroborated Slater's testimony except for the important fact that Slater said he had driven onto Christiana from 16th Street, not Douglas Street as later testified. (Christiana is a one-way southbound street, and 16th Street is south of the block where Howard was killed.) Slater also mentioned that his headlights had caught Harris's face, and that Harris got into the Buick and drove off passing him. Slater then looked at a group of five photos and identified Harris as the shooter.

O. Based on Slater's statement, Harris was apprehended for investigation. The police found Harris lying in the rear seat of a parked auto at 1201 S. Lawndale, arrested him, and advised him of his rights. Harris said he was not present when the victim was shot and would not make any further statements. The police charged Harris with murder and officers were ordered to locate Curtiss Fowlkes to see if he could identify Harris. The record nowhere reveals whether Fowlkes was ever located.

5. Based on the foregoing, Musburger obtained through further discovery the rap sheets of McWhorter, George Williams, Darryl Tapes, Betty Larry, Curtiss Fowlkes, Leroy Carter, and others named in the police report but of no consequence here. Antonio Slater had no criminal record; the other witnesses all did.

6. Musburger could not recall what specific efforts he made to interview the witnesses named in the police files. He recalled making such efforts generally but having very little success in finding witnesses whose testimony would have been helpful. (I. 82, 103). He specifically recalled attempting to interview a man in a basement apartment who refused to cooperate, and remembered speaking to two women across the street from that apartment who told him that if called to testify they would identify Harris as the shooter. (I. 103). At his deposition, Musburger recalled that these women had previously said something helpful to the police. (Ex. 2, pp. 47-49). He could remember no names for these witnesses, but conjectured at the hearing that Alice Riles was probably not one of the two witnesses. Although Leroy Carter lived in a basement apartment on Christiana, he testified that he never spoke to a defense attorney before trial. The court finds it probable that neither Carter nor Riles were among the witnesses contacted prior to trial.

7. Musburger made no attempt to interview Antonio Slater further, and either could not find George Williams or could not get George Williams to cooperate. There is no evidence as to whether

Musburger did or did not interview McWhorter, but Harris has never alleged that Musburger failed to interview McWhorter, or that he (Harris) was prejudiced by this failure.

8. Initially, Harris informed Musburger that he had been in Cook County Hospital on or around the night of the murder, July 9, 1977, and therefore couldn't have committed the crime. Harris testified that he never claimed to have been in the hospital on July 9th, but Musburger remembered otherwise. Although Musburger's memory was sketchy, and Harris did not strike the court as a liar, the court believes that Musburger's memory is probably accurate on this point. Musburger subpoenaed the hospital records to learn that Harris had entered Cook County Hospital on July 13, 1977, after the crime occurred, and had told the doctors on entering that he had been injecting heroin as recently as two days before. (Resp. Ex. 5). Those records also revealed that Harris had been released from Madden Mental Health Center in Hines, Illinois, where he had been treated for hallucinations, on July 7, 1977. (I. 23; Ex. 8). There is no evidence that Musburger subpoenaed these other medical records, and probably he did not.

9. Prior to trial, Musburger spoke with a group of three to six people, including petitioner's mother, Emma Harris, petitioner's common-law wife Jewel Connors, and possibly Jewel's sister Genise Connors. These people informed him that petitioner had been ill at the Connors' home on the day of the incident. (II. 35). Musburger spoke with these people at least twice (I. 13),

but determined that they were not believable and would not have withstood cross-examination. He recalled thinking that the witnesses were inconsistent among themselves, although he could not remember specifics, and that some or all of them seemed to be high on drugs. (I. 74-76; II. 25-26). His notes reflect that Mrs. Harris had also informed him she was "positive Warren was home sick with her." (Ex. 65). Musburger's disbelief in these witnesses was fueled by his frustration that Harris's earlier hospital alibi had proven false. (I. 90-92; II. 26).

10. Musburger also spoke with two men whom Mrs. Harris identified at trial as being Ronnie Harris, Warren's brother, and Jim Greer, a friend of Ronnie's. (II. 37-38, 82). Both men were willing to testify that Slater and McWhorter were friends and that they had seen the two men together in Chicago's Central Park on the south side. (II. 37-38). Musburger's trial notes make reference to Ronnie Harris and the Central Park area (Ex. 66), but Musburger had no recollection of the names or the allegation. Neither witness was called to testify at trial.

11. Musburger did recall a general concern that Harris's proposed witnesses appeared to be heroin addicts. (I. 75, 96). He emphasized that it was his strategy to keep out any reference to heroin abuse lest the jurors be prejudiced against Harris for drug involvement. (I. 97). While there is no evidence other than Musburger's impression that these witnesses were in fact drug

users, the court has no basis for concluding that his perception was demonstrably incorrect.

12. Musburger and co-counsel Kuhlen did not visit the scene of the crime until approximately one month before trial, at which time there was snow on the ground and the leaves were off the trees. (I. 24-25). Although the crime occurred on a summer's night, the only photos of the scene prepared by the defense were taken in the winter during daylight hours.

13. After the preliminary hearing, Musburger never verified whether in fact there was a liquor store at 13th and Kedzie where Slater might have seen Harris. There is in fact a billiards parlor at that corner where liquor is apparently sold.

14. On December 15, 1977, the defense answered ready for trial and jury selection in People v. Harris before the Honorable Louis Garippo of the Circuit Court. By this time, defense counsel had abandoned any interest in an alibi defense, and intended to rely on the state's inability to prove Harris guilty beyond a reasonable doubt. (Ex. 14). Prior to the opening statement, Laverne Tapes, Alice Riles, Leroy Carter, and a Mr. Tapes (presumably Darryl) were identified as being present in the courtroom. (Ex. 1, p. 22-23). Musburger informed the court that Tapes and Riles had been subpoenaed. Id.

15. Upon conclusion of the prosecution's opening statement, Kuhlen made the opening statement for petitioner. In her statement, she identified Melvin McWhorter (who had not been

mentioned in the prosecutor's opening) and made the following remarks:

> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.
>
> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that he had gone into the neighborhood to purchase narcotics, that he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Tr. 31-33). Kuhlen continued, discussing how Slater's statement to the police six weeks after the shooting switched the focus of suspicion from McWhorter to Harris, and asking the jury to examine closely Slater's credibility.

16. Musburger recalled interviewing witnesses during the course of trial, without substantive results. (I. 103; II. 11-12). Just before opening statement, Kuhlen advised the court that both Alice Riles and Leroy Carter "might be called in rebuttal, depending on what the state has." (Tr. 23). Leroy Carter recalled that on the day he showed up at the courtroom he spoke in the hallway with a male lawyer who told him that they might need him and then they

might not. (III. 11-12, 21). The court finds that the person was probably Musburger, even though Musburger himself did not recall the interview, since Carter would have been of no use to the prosecution. Had Carter been called to testify, he would have said that he saw a man other than Harris running across a playlot shortly after the shooting, and that the man was the same he'd identified at the police line-up. Carter did not witness the shooting, however, and could not remember at the evidentiary hearing whether he'd seen a Buick Electra or not. (III. 6, 17).

17. The state called six witnesses: Howard's father, to testify to the fact of death; Maurice Williams, who came to the victim's aid just after the shooting; Officer Joseph Michello, who appeared on the scene shortly thereafter; Antonio Slater; the officer who arrested Harris; and the doctor who performed the autopsy.

18. On direct examination, Williams was asked whether he knew a person by the name of Buster. He said yes, and, in response to further questions, said he saw Buster at the crime scene sometime after the police arrived. (Tr. 46). On cross-examination, he reiterated that it wasn't until after the police arrived that he saw Buster. (Tr. 51).

19. During the prosecution's case, Musburger made an oral motion in limine to preclude the state from eliciting any testimony as to threats Antonio Slater had received in connection with the case. The prosecutor represented to the court that shortly

after Harris's arrest, Slater's automobile was shot up. Harris himself was in custody at the time. The prosecution advised it would not elicit the information on direct examination, and the matter was dropped. (Tr. 54-55).

20. Slater was the sole witness at trial to identify Harris. Slater testified on direct examination that he was driving southbound on Christiana from Douglas Street when he heard a shot and witnessed a man push down another man, who fell. The man who remained standing then turned and ran to a Buick Electra sitting in the street, momentarily faced Slater, pulled up a pistol at Slater, and jumped into the passenger seat of the car. Slater's headlights picked up the man's waist, and Slater recognized the man as Wayne, whom he knew from a poolroom at 13th and Kedzie. Slater also pointed out Harris in the courtroom and mentioned that gold street lights along Christiana were lit. Slater further testified that he went to the police station on his own, and that he didn't know anyone by the name of Buster or Melvin McWhorter.

21. On cross-examination, Musburger brought out that Slater had waited almost six weeks before talking to the police. Musburger also highlighted several inconsistencies between Slater's pretrial statements and his trial testimony. In particular, Musburger brought out that Slater's signed statement to the police refers to turning onto Christiana from 16th Street, not Douglas; that Slater told the police that Harris got into a car which "drove off past" him instead of one which blocked his way in front; and

that he told the police a whole bunch of people came around after the shooting but said at trial that he saw no one else other than Howard and petitioner. Slater was also impeached as to whether his car was stopped for mere seconds or a few minutes, and admitted that he had not seen Harris at the poolroom for over two years. Musburger did not impeach Slater's statement that he had gone to the police voluntarily, that there were streetlights, or Slater's statement at trial that he knew Harris from a poolroom (as opposed to a liquor store) at 13th and Kedzie. (I. 27).

22. On December 21, 1977, the defense rested without putting on any evidence. Harris first learned of counsel's decision not to put on a defense earlier that morning, when Musburger advised him that Slater had been successfully impeached. (II. 78). Harris went along on counsel's advice. Musburger recalled that at the time the state closed their case, he and Kuhlen felt that the prosecution's case was weak and that the jury "would be out a very short time and give a not guilty to our client," and that this was the "biggest reason" why no witnesses were called. (II. 32). Musburger also must have been aware that this meant abandoning the McWhorter line of defense, since he orally moved to preclude the state from commenting in closing on Kuhlen's opening statement. (Tr. 128).

23. Later that same day, the jury returned a verdict of guilty. Immediately afterwards, the alibi witnesses angrily confronted Musburger outside the courtroom to ask why no witnesses

had been called in Harris's defense. Musburger recalled the confrontation as "not a comfortable moment." (I. 22).

24. Charles Thomas, a letter carrier for the United States Post Office since 1969, was at the time of petitioner's trial the common-law husband of Genise Connors, the sister of petitioner's common-law wife, and knew Warren socially. Thomas was available to testify at petitioner's trial but was never contacted by petitioner's lawyer. Had Thomas been called, he would have been willing to testify that petitioner was home sick the evening of the murder, July 9th. Thomas recalled being at the Connors' house after he got off work that day to assist them in preparing for movers who were to come the next day. (II. 56). Thomas was a credible witness, has an honorable discharge from the army, and would not have presented the drug problems that Musburger noticed with petitioner's other proposed witnesses. However, Thomas's testimony would not have been terribly helpful, since the only reason he was sure of the date was that Genise had told him it was the day "that Warren was at the hospital and we was all moving and everything." (II. 53).

25. Genise Connors is a high school graduate and is presently employed as a lab technician at Chicago Rawhide. (III. 32-33). In July of 1977, Ms. Connors' mother and Jewel Connors lived at 1106 S. Independence, Chicago, Illinois. (III. 34). Genise Connors spoke to Musburger on two occasions prior to trial and informed him that she was willing to testify. (III. 40-42). She was never called to testify at petitioner's trial.

Had Genise Connors appeared at petitioner's trial, she would have testified that petitioner was home sick on the evening of July 9, 1977, while she and the other members of her family were engaged in packing and loading her mother's house incident to Mrs. Connors' move to Mississippi. Genise Connors' testimony as to the events of July 9, 1977, were not credible. She knew Harris was sick in bed one night during three days of packing, but she couldn't single out which one. (III. 36-37, 43-44). The only thing Connors could distinctly remember at the evidentiary hearing was that Harris was arrested on the corner outside her home on Independence the day or so after the move. (III. 45-46, 50). According to the state court trial testimony, the police records, and petitioner's own testimony here, petitioner was arrested more than a month later at a different location. (III. 63). Connors' certainty on this clearly erroneous point led me to believe that she was not a credible witness, and most likely would not have been a credible alibi witness back in 1977.

26. Harris himself testified to being home sick around the night of the move, and said he was sure of the date because of his release from the hospital. Records show, however, that Lawrence Moving came to the Connors house on July 8th, the day before the murder. Thomas remembered the events happening before the movers came, on a day he worked, and apparently on a day Genise said Warren had been at the hospital. The court finds that Warren was home sick one night in early July, but that the evening in

question was probably Thursday, July 7, 1977 (the date petitioner was released from Madden), or even Friday, July 8, 1977, but probably not Saturday, July 9, 1977.

Conclusions of Law

1. Under Strickland v. Washington, 104 S.Ct. 2052 (1984), a criminal defendant who wishes to set aside his conviction for ineffective assistance of counsel must demonstrate that "counsel's representation fell below an objective standard of reasonableness," id. at 2065, and that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

2. The "reasonable probability" standard of Strickland is more restrictive than the standard applied by the Seventh Circuit in United States ex rel. Cosey v. Wolff, 727 F.2d 656, 658 (7th Cir. 1984), where the court said: "Once a court finds that . . . the counsel's [unprofessional] acts or omissions may have impaired the defense, the burden of proof is on the government to prove beyond a reasonable doubt that the trial counsel's ineffective assistance did not affect the verdict." In effect, petitioner must show that the error was probably not harmless. However, a habeas petitioner raising an ineffectiveness claim need not show that counsel's

performance "more likely than not" affected the outcome of the trial. Strickland, 104 S.Ct. at 2068.

3. Effective representation hinges on adequate pretrial investigation, and therefore the right to competent counsel imposes a correlative duty on defense counsel to undertake reasonable steps in determining all avenues of defense. Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984), cert. denied, 105 S.Ct. 1221 (1985). Strategic choices made after less than complete investigation are reasonable only to the extent that professional judgments support the limitations on further investigation. Strickland, 104 S.Ct. at 2066. An informed tactical choice of trial strategy, however, is not reviewable on an ineffectiveness claim. United States v. Dyer, 786 F.2d 812, 816 (7th Cir. 1986).

4. Pursuant to the above, defense counsel should ordinarily interview not only his or her own witnesses, but also those that the state intends to call. Crisp, 743 F.2d at 584; United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

5. Although each allegedly incompetent act or omission must be examined individually, the cumulative efffect of all errors must be examined in light of the totality of the circumstances, including the strength or weakness of the government's case. Strickland, 104 S.Ct. at 2069; Crisp, 743 F.2d at 583.

6. Petitioner has failed to show that his attorney acted unreasonably in deciding that petitioner's proferred alibi witnesses were unreliable and thereby declining to call them as witnesses.

The chief alibi witness, Ms. Connors, struck this court as lacking credibility, and the moving records weaken rather than substantiate the alibi.

7. Petitioner has failed to show that counsel acted incompetently in not calling any of the doctors at Cook County Hospital to corroborate the alibi witnesses' story that he was ill on July 9, 1977. The hospital records would have injected the issue of Harris's heroin use into the trial, which Musburger sensibly wished to avoid. Moreover, Musburger had already decided that the alibi was not credible, and therefore there was nothing to corroborate.

8. Petitioner has failed to show prejudice from counsel's alleged failure to interview or call as witnesses Investigators Peck and Sykes to impeach Slater as to where the victim was shot. The police records sustain Slater's testimony that Howard was shot on the sidewalk, and neither investigator was called at the evidentiary hearing to testify otherwise.

9. Petitioner has failed to show prejudice from counsel's failure to interview or call as a witness George Williams. Williams did not appear at the evidentiary hearing, his statements to the police are not exculpatory of petitioner, and it therefore remains speculative whether Williams' testimony would have helped the defense.

10. Petitioner has failed to show that counsel unprofessionally failed to interview or call Joann Hightie, or that

he was thereby prejudiced. Given counsel's admission that he probably would not have subpoenaed Riles unless he thought she might be helpful, that would make it likely that Hightie was one of the women he spoke to on Christiana St. While the evidence is unclear, even if counsel did not interview Hightie, it is speculative whether her testimony would have helped the defense. Although Hightie had told the police saw two men running through a playlot, she also saw a Buick Electra similar to the car described by Slater. While Hightie "might" have testified at trial that the car was a different color, it is not reasonably certain she would have, and the discrepancy could be seen as a minor point.

11. Assuming that Musburger never interviewed Fowlkes (the evidence is unclear), petitioner has nonetheless failed to show prejudice from this omission. It appears from the circumstances that Fowlkes would have strengthened the government's case in that he described Howard's assailant as age 25-26, 5'10" to 6' tall, medium build, dark complexion, and medium afro hairstyle -- terms which matched Slater's description and which fit petitioner. Fowlkes had also seen the assailant get into a Buick Electra parked alongside the scene, and was according to Betty Garry with McWhorter after the crime. Although Fowlkes testified to a different colored shirt and car than had Slater, these discrepancies might have been explained or been viewed as minor in light of the significant similarities. It is troubling that the police records indicate a search for Fowlkes without further mention, but this court never

learned what further testimony from him would have produced. Petitioner has therefore not shown that Fowlkes' testimony was reasonably likely to help his defense so as to show prejudice from counsel's omission.

12. Petitioner has failed to show that trial counsel was ineffective in that the defense photographs of the crime scene were taken during the day after leaves had fallen from the trees. Trial counsel was able to use the photographs to instruct the jury on the important point that no streetlights would have directly illuminated where Howard was shot, and there is no indication on this record that night pictures would have materially aided that impeachment. This impeachment by photograph also cures any alleged ineffectiveness regarding counsel's failure to cross-examine Slater about the streetlights; the photographs provided a surer route to effective impeachment, and, contrary to petitioner's allegation #12, Slater's preliminary hearing testimony as to the presence of streetlights was not inconsistent with his trial testimony. While night pictures, if obtainable, might have been preferable, the benefit is speculative and counsel's oversight is in any event too minor to justify vacating Harris's conviction.

13. Petitioner has failed to show prejudice from counsel's failure to investigate the existence of a poolroom at 13th and Kedzie, since the testimony at this trial indicates that there is in fact a billiards parlor at that corner. While Slater referred at the preliminary hearing to the poolroom as a liquor store and

not a poolroom, petitioner's counsel suggested at one point in this court that the billiards parlor in fact sells liquor. The court does not find counsel's failure to impeach Slater on this discrepancy a significant omission which would have been reasonably likely to help the defense.

14. Petitioner has failed to show ineffectiveness in counsel's failure to offer into evidence the agreed stipulation that would have perfected the impeachment of Slater's trial testimony regarding whether he turned onto Christiana from Douglas Street. Slater had originally told the police that he had turned onto Christiana from 16th Street, which meant he would have turned onto Christiana (a southbound street) south of where the shooting occurred. On cross-examination, Slater denied ever telling the police that he turned off of 16th Street but admitted that his signed written statement said 16th Street. (Tr. 92). The parties worked out a stipulation that Officer Shine, if called to testify, would verify the accuracy of the signed statement as to what Slater had said. (Tr. 123-24, 128). The prosecution agreed to treat the impeachment as perfected, however, and the stipulation was never introduced. (Tr. 130). Musburger testified that he didn't want to aggravate the jury by further corroborating Slater's admission to an inconsistent statement. (II. 27-28). The court finds this explanation questionable, since a stipulation is hardly aggravating. The court notes, however, that the inconsistency was argued to the jury, and the prosecution, pursuant to its agreement, never mentioned

in closing argument Slater's denial of the inconsistency. The prejudice, if any, is too tenuous to support overturning petitioner's conviction.

15. Petitioner has not shown that counsel was ineffective for not impeaching Slater's testimony that he went to the police voluntarily. Under the McWhorter theory, which counsel had concluded was its best defense when trial began, having Slater voluntarily approach the police made it more likely that he was protecting someone. The failure to impeach Slater on this point by calling Officer Shine was neither unreasonable nor prejudicial, and possibly a tactical decision.

16. Petitioner has failed to show prejudice from counsel's failure to file a motion to disclose the identity of the informant. Musburger conceded at trial that this information could have been crucial had it provided a link between McWhorter and Slater, and the omission was not backed up by any professional judgment. Nonetheless, Musburger remembered no evidence of a McWhorter/Slater link, and petitioner has put forth no competent evidence at this hearing to show that McWhorter and Slater were in fact acquainted. It is therefore wholly speculative what such a motion would have revealed.

17. Petitioner has failed to show ineffectiveness in counsel's failure to interview Slater prior to trial. The need for such an interview was diminished in part by Musburger's ability to cross-examine Slater at the preliminary hearing, and any attempt at

an interview was problematic given that Slater's car had been shot at in an apparent threat attempt, which may or may not have been linked to petitioner. It is speculative on this record whether a pretrial interview would have enhanced Musburger's ability to impeach Slater in a material way.

18. Petitioner has failed to show prejudice from counsel's failure to put Ronnie Harris or Jim Greer on the stand to testify that McWhorter and Slater had been seen together in Chicago's Central Park. (II. 38). Police reports indicate that Slater in fact lived on Central Park. (Ex. 48). Musburger could not recall why he did not call these people to the stand. (I. 47-48). The state argues in its brief that these witnesses must have been among the witnesses whom Musburger thought were drug users. This is plausible, but Musburger's trial notes make reference to Ronnie Harris and the Central Park area, and the McWhorter defense, unlike the alibi defense, remained a viable theory at the time trial began. Thus it is doubtful whether or not the decision not to call Harris and Greer as witnesses was based on professional judgment. In any event, this court heard no testimony from either Greer or Ronnie Harris which would have enabled it to determine, as with Genise Connors, whether their testimony would have been credible, and therefore helpful to the defense.

19. Even if petitioner has shown ineffectiveness in connection with counsel's not putting Greer or Ronnie Harris on the stand, not taking proper photographs, and not interviewing Hightie,

Fowlkes, and Slater, these claims were never made in the state post-conviction hearing and are therefore waived under the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977).

20. Although the evidence is very close, petitioner has failed to show prejudice and ineffectiveness in counsel's decision not to call Alice Riles and Leroy Carter as witnesses at trial. It is more probable than not that these witnesses were consulted by counsel at trial, however briefly, and that counsel then made a strategy decision at the close of the state's case not to put them on the stand. This strategy puzzled the court greatly at the hearing, since Riles' and Carter's testimony might have raised doubt by suggesting that the men runing from the scene were in fact the assailants, and Musburger's belief in a probable acquittal would not excuse putting on further helpful evidence.

Close examination of the police records, however, reveals that the McWhorter story was not as strong a defense as Kuhlen's opening statement suggests. While Carter would have testified that he saw two men, one of whom was McWhorter, run from the area just after the shooting, Carter could offer no further exculpatory testimony, and Musburger knew of several witnesses --Clarence Gibson, Curtiss Fowlkes, Betty Larry-- who would be called to corroborate Maurice Williams' testimony that McWhorter had in fact not left the scene. Actually putting on Riles and Carter as witnesses also raised the possibility that the prosecution would call McWhorter, whom Musburger knew was ready to finger his client.

Thus, the McWhorter defense was chiefly a viable theory for cross-examining the state witnesses, particularly if McWhorter took the stand, but does not appear to have been valuable as an actual defense. Kuhlen advised Judge Garippo that Carter and Riles might be called in rebuttal depending on the state's case, but Musburger remembered nothing substantive coming out of his continued witness interviews during trial. Moreover, the state weakened this defense by putting on only Slater as a substantive witness and eliciting from Maurice Williams that McWhorter had remained on the scene. Thus, the evidence suggests that Musburger's investigation led him to believe the defense would not have held up, and petitioner has put forth no evidence that the defense theory has merit as the true version of events. The court cannot conclude that trial counsel acted below a level of competence by raising the theory during opening argument but then abandoning the defense after further interviews and after the state had presented a perceptibly weak case.

21. The cumulative effect of all counsel's errors, while troublesome, does not make out a sixth amendment violation. Counsel was clearly remiss in not discussing his strategic decisions with petitioner. It is also probable from the record before this court that petitioner's counsel did not thoroughly investigate all witnesses named in the police reports, but the benefit which might have accrued from further investigation (and thereby the reasonableness of Musburger's conduct) is murky at best. As the state notes

in its post-trial brief, petitioner's version of the defense is still "no more than a version, even after an extended evidentiary hearing." Specifically, petitioner has not shown that further investigation would have strengthened rather than weakened the defense theory he claims his counsel unreasonably abandoned. Since the police reports are hearsay as to the truth of their contents, this court has insufficient evidence to find that further investigation would have benefitted petitioner. Petitioner has therefore failed to establish a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Conclusion

Accordingly, the court enters judgment for respondent, and sua sponte grants petitioner a certificate of probable cause for appeal. 28 U.S.C. §2253. Appointed counsel are directed to advise petitioner of his right to appeal and the procedures for filing an appeal.

It is so ordered.

Susan Getzendanner
United States District Judge

May 30, 1986

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No. 87-5677

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED STATES OF AMERICA Ex Rel.

WARREN LEE HARRIS,

Petitioner,

-vs-

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 87-5677
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

UNITED STATES OF AMERICA ex rel. WARREN LEE HARRIS, Petitioner,	)	
vs.	)	On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 86-2032
MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois, Respondents.	)	

REPLY BRIEF
IN SUPPORT OF PETITION OR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The question that has devolved in this case and in Meadows v. Holland, 831 F.2d 495 (4th Cir. 1987), petition for cert. filed December 15, 1987 (No. 87-6063), is whether the disarray among the circuits concerning when to allow federal habeas review, where the state court has discussed both a procedural default and the merits of the claim, is important enough to warrant plenary consideration by this Court. This question must be answered affirmatively. The dispute among the circuits involves important considerations of comity between the federal and state courts. As evidenced by the numerous reported decisions, the federal courts are wrestling with this issue on a very regular basis. So long as this Court permits federal habeas review of state convictions, it should ensure that such review is

on a uniform basis and is not dependent on whether a petitioner resides in a particular federal circuit.

I. REPLY TO THE STATE'S OPPOSITION TO CERTIORARI

A. The Very Cases Cited By The Brief In Opposition Expressly Acknowledge A Conflict Among the Circuits As To When To Allow Habeas Review Where A State Court Opinion Has Discussed Both A Procedural Default And The Merits.

The State's assertion that no conflict exists is plainly belied by the cases it cites. (Brief in Opp., pp. 3-4) In Phillips v. Smith, 717 F.2d 44, 47-48 (2nd Cir. 1983), cert. den. 465 U.S. 1027 (1984) (emphasis added), the Court of Appeals observed that:

> On one side of the question are the Fifth, Ninth and Eleventh Circuits. Each of these courts believe that Wainwright v. Sykes [443 U.S. 72 (1977)] does not bar federal habeas review of federal constitutional claims unless the state court relied exclusively or solely on the petitioner's procedural default. [Citations omitted.]
>
> On the other side of the question are the Third and Seventh Circuits which hold that the cause and prejudice analysis applies whenever the state court expressly relied on an adequate and independent state procedural ground. [Citations omitted.] The Sixth and Eighth Circuits employ a more flexible standard, applying the procedural default role of Wainwright v. Sykes only when the state court relied primarily on the procedural ground. [Citations omitted.]
>
> * * *
>
> Because the circuits are divided and because there is no controlling precedent from the Supreme Court or from this Court, our inquiry begins with the policies underlying the procedural default rule of Wainwright v. Sykes.

Similarly, Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983) cert. den. 468 U.S. 1220 (1984) (emphasis added), acknowledged that "[w]here the state court decision relies on a procedural default and a lack of merit, the situation is unclear." The three-way split among the circuits also is noted in Davis v. Allbrooks, 778 F.2d 168, 175 (4th Cir. 1985), United States ex rel. Caruso v. Zalinsky, 689 F.2d 435, 439-40 (3rd Cir. 1982), and Cook v. Lynaugh, 821 F.2d 1072, 1077 (5th Cir. 1987), all cited by the State at pages 3-4 of its brief.

The importance and frequency of the disagreement among the circuits has been observed by various commentators. See e.g., Dobbins, Applying Wainwright v. Sykes To State Alternative Holdings And Summary Affirmances, 53 Fordham L. Rev. 1359, 1360-63; 1376-78 (1985) (attached hereto as Appendix A); D. Wilkes, Jr., Federal And State Postconviction Remedies And Relief §8-24, at p. 166 (1983). Most recently, the continuing dispute appeared in Meadows v. Holland, 831 F.2d 495 (4th Cir. 1987), now before the Court in Petition For Writ of Certiorari, No. 87-6063, wherein the Fourth Circuit, sitting en banc, split 6-4-4-4 over whether a procedural default that could provide an "adequate and independent" state ground for denying habeas relief must be clearly demonstrated within the "four corners" of the state court opinion. Thus, the State's assertion that "the Circuits are in agreement..." (Brief in Opp., p. 3) is flatly incorrect.

B. Harris Would Benefit From Intervention By This Court.

Also incorrect is the State's assertion that Petitioner "Harris could never benefit from this Court's intervention." (Brief in Opp., p. 4). The State ignores that the majority of the Court of Appeals panel has never addressed the merits of Harris' claim because it found the claim had been waived. The majority's reading of the ambiguous Illinois Appellate Court decision "suggested" that the Appellate Court intended to find that Harris had waived his claim, even though the Appellate Court did not so state. Thus, intervention by this Court would afford to Harris a full and proper review of the merits of his claim of ineffective assistance of counsel which the District Court of Appeals and the concurring opinion below both acknowledge presents a "very close" question.

Finally, even if the Court should agree with the Court of Appeals below that the ambiguity in the Illinois Appellate Court decision should be resolved against Harris and that a procedural default need not be the exclusive basis of the state court's decision, Harris' case nevertheless should be remanded for a hearing on "cause and prejudice" under Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977). Federal habeas review is permissible, notwithstanding an unequivocable state court finding of procedural default, if the petitioner can show "cause and prejudice." Id. Here, Harris has never had an opportunity to show why his

appointed appellate counsel failed to raise ineffective assistance of counsel as an issue in Harris' state court appeal.

The procedural history of this case shows why. Harris originally filed a handwritten pro se petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois. The District Court was persuaded by Harris' petition that the Illinois Appellate Court had excused Harris' procedural default, and thus never inquired of the reason for, or the consequences of, that default. The District Court held an evidentiary hearing only on the issue of whether Harris received effective assistance of counsel at his 1977 murder trial. Hence, Harris' right to a hearing on cause and prejudice (see Preston v. Maggio, 705 F.2d 113, 117 (5th Cir. 1983)), has fallen through the cracks.

The State's assertion that "Harris had a chance to make out a colorable claim for cause and prejudice in the lower courts..." (Brief in Opp., p. 8) again is incorrect. The District Court clearly obviated the need to show "cause and prejudice" because it found no default and went on to consider the merits. Therefore, at no time did Harris have an opportunity to address the issue of whether his appointed state court appellate counsel competently omitted the issue of the effectiveness of Harris' trial court counsel. Moreover, the State's suggestion that Harris should have argued "cause and prejudice" in his Petition For Rehearing to the Court of Appeals ignores the Catch-

22 problem in this case - namely, that the facts necessary to make this argument are outside the record on appeal.

II. CONCLUSION

The petitioner respectfully submits that the serious questions raised by the Petition in this case and in Meadows, No. 87-6063, warrant plenary consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Kimball R. Anderson, an attorney, hereby certifies that he served the foregoing "Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" upon:

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by depositing a copy of same in the United States Mailbox located at One First National Plaza, Chicago, Illinois, with postage fully prepaid, on February 4, 1988.

_____
KIMBALL R. ANDERSON

APPLYING *WAINWRIGHT V. SYKES* TO STATE ALTERNATIVE HOLDINGS AND SUMMARY AFFIRMANCES

INTRODUCTION

In 1963, the Supreme Court in *Fay v. Noia*[1] rejected the proposition that the doctrine of adequate and independent state procedural grounds[2]

1. 372 U.S. 391 (1963).

2. This doctrine limits federal jurisdiction. The Supreme Court on direct review of a state court decision will not review the state judgment if it rests on adequate and independent state grounds. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983); Henry v. Mississippi, 379 U.S. 443, 446 (1965); Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875). Justice Jackson speaking for the Court explained the reasoning:

> [The reason] is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

It has been argued that the real rationale for the doctrine is that the federal question is mooted by the existence of a state ground which will support the judgment. J. Nowak, R. Rotunda & J. Young, Constitutional Law 95 (2d ed. 1983); *see* Fay v. Noia, 372 U.S. 391, 429-30 (1963). Whether this jurisdictional limit is statutory or constitutionally mandated is not settled. *See* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 188-89 & n.6. *Compare Noia*, 372 U.S. at 429 n.40 (expressing no opinion) *with id.* at 466-67 (Harlan, J., dissenting) (arguing that it is constitutionally mandated).

A distinction has been made between procedural and substantive state grounds. "While [this Court] has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights." *Noia*, 372 U.S. at 432; *see* Henry v. Mississippi, 379 U.S. 443, 446-48 (1965). *But see* Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 989 (1965) [hereinafter cited as Hill I]; Sandalow, *supra*, at 197-99; Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1054 (1977).

A state ground is adequate if it is sufficient in itself to maintain the judgment. *See* Eustis v. Bolles, 150 U.S. 361, 369-70 (1893). However, not all state procedural grounds are adequate to block consideration of the federal issue. *See, e.g.*, Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) (default rule inconsistently applied cannot be invoked to bar federal claim); NAACP v. Alabama, 377 U.S. 288, 301 (1964) (new rule of procedure cannot be created to bar federal claim); Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes [sic] the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."), *see also* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680-82 (1930) (state procedural ground that is unconstitutional is not adequate); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920) (same). Whether the state procedural ground is adequate to block consideration of the federal issue is a question of federal law which federal courts must decide. Henry v. Mississippi, 379 U.S. 443, 447 (1965); *see* Michigan v. Long, 463 U.S. 1032, 1038 (1983); Chapman v. California, 386 U.S. 18, 21 (1967); Ancient Egyptian Arabic Order of Nobles

APPENDIX "A"

constituted a jurisdictional bar to federal habeas corpus review of state criminal convictions.[3] The Court held that although an adequate and independent state procedural ground blocked direct review by the Supreme Court, federal habeas relief remained available.[4] The *Noia* Court further stated that lower federal courts may exercise their jurisdiction to hear the petition of a prisoner who had lost the right to raise a federal constitutional issue because of a procedural default, unless the prisoner had "deliberately bypassed" the procedural rule.[5]

Subsequent to *Noia*, the Court limited the discretion of federal courts to exercise habeas corpus jurisdiction.[6] Indeed, in a series of cases culmi-

of the Mystic Shrine v. Michaux, 279 U.S. 737, 744-45 (1929); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920).

Professor Wright has summarized the cases of inadequate state grounds as follows:

> If there is no fair and substantial support in the facts for the state court's ruling on the state ground, the Supreme Court can disregard it. A new state rule cannot be invented for the occasion in order to defeat the federal claim. It has been said that if the state court's refusal to consider the merits of a case is based on a rule "more properly deemed discretionary than jurisdictional" this does not bar review in the Supreme Court. Even a state procedural rule of general applicability may be thought not an adequate state ground if it is so strict that it interferes unduly with the presentation of federal questions.

C. Wright, Law of Federal Courts § 107, at 748-49 (4th ed. 1983) (footnotes omitted) (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969)).

To be independent the state court's decision must derive solely from state law. *See* Michigan v. Long, 463 U.S. 1032, 1044 (1983). If the state court holds that the federal constitution compelled the result, that state ground is not independent. *See id.* at 1040-41, 1043-44; Minnesota v. National Tea Co., 309 U.S. 551, 554-55 (1940). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §§ 4023-4025 (1977 and Supp. 1984). For a complete discussion of the doctrine of adequate and independent state grounds, see generally *id.* at §§ 4019-4028.

3. *See* Fay v. Noia, 372 U.S. 391, 399 (1963). The grant of federal habeas jurisdiction over persons in state custody is found at 28 U.S.C. § 2254 (1982). If the federal court issues the habeas writ the state is required to retry the case or release the petitioner. *See* C. Wright, *supra* note 2, § 53, at 332.

For discussions of the background, history and concerns involved in federal habeas review of state court convictions, see generally C. Wright, *supra* note 2, § 53; L. Yackle, Postconviction Remedies §§ 15-21 (1981 and Cum. Supp. 1985); Note, *Federal Habeas Corpus Review of State Forfeitures Resulting From Assigned Counsel's Refusal to Raise Issues on Appeal*, 52 Fordham L. Rev. 850, 850-52 & nn.1-3 (1984) [hereinafter cited as *Federal Habeas Corpus Review*].

4. *See* Fay v. Noia, 372 U.S. 391, 398-99, 426-34 (1963).

5. *See id.* at 438. A deliberate bypass is "'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Errors of counsel committed after conviction without the defendant's knowledge will not be visited upon the defendant. *Id.*; *see* Humphrey v. Cady, 405 U.S. 504, 517 (1972). Only when a defendant knowingly and intentionally abandons the right has he deliberately bypassed the state procedure for vindicating that right. *See Noia*, 372 U.S. at 439. *But see* Wainwright v. Sykes, 433 U.S. 72, 94 n.1 (1977) (Stevens, J., concurring) (courts have found deliberate bypass without intent of defendant). It has been argued that the deliberate bypass standard was never intended to be applied to errors committed during trial; rather, it was limited to post-conviction decisions in which the defendant participated. *Id.* at 91-92 (Burger, C.J., concurring).

6. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Francis v. Henderson, 425 U.S.

nating in *Wainwright v. Sykes*[7] the Court substantially limited the reach of *Noia*.[8] In *Sykes*, the habeas petitioner had forfeited his right to raise a federal constitutional claim in state court because he failed to object contemporaneously.[9] The Supreme Court held that a federal habeas court could review a petition involving a procedural default only when a defendant could show cause for and prejudice arising from the default.[10]

536, 538-39, 541-42 (1976); Davis v. United States, 411 U.S. 233, 242 (1973); L. Yackle, *supra* note 3, § 21, at 102-03.

7. 433 U.S. 72 (1977). See *supra* note 6.

8. *See id.* at 87-88 & n.12. See *infra* note 70 and accompanying text.

9. *See id.* at 75, 86-87. Florida law required the defense to object at or prior to trial to the erroneous admission of a confession or be deemed to have waived the objection. *See id.* at 76 n.5, 86. The *Sykes* Court rejected the petitioner's contention that Florida did not have a contemporaneous objection rule, stating that "Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all." *Id.* at 86.

10. *See id.* at 87. The *Sykes* rule provides that when a procedural default constitutes an adequate and independent state ground sufficient to block direct Supreme Court review, the petitioner must demonstrate cause for and prejudice arising from the default before the reviewing court may disregard the default and entertain the claim on the merits. *Id.* at 86-87; *see* Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 128-29 (1982); L. Yackle, *supra* note 3, § 82 (1981); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1059 (1978) [hereinafter cited as Hill II]. This limitation does not arise from the limited scope of the federal courts' jurisdiction. Rather, it is a discretionary limit on the exercise of that jurisdiction. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Francis v. Henderson, 425 U.S. 536, 538-39 (1976); Fay v. Noia, 372 U.S. 391, 438 (1963). The Supreme Court justifies this limit because habeas corpus review is equitable in nature. *See Noia*, 372 U.S. at 438. The *Sykes* rule places the burden of proving cause and prejudice on the habeas petitioner. *See* Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

However, the definition of cause and prejudice is not clear. The *Sykes* Court left the definition to later cases. *See Sykes*, 433 U.S. at 87; *see also* Engle v. Isaac, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting). The Court in *Reed v. Ross*, 104 S. Ct. 2901 (1984), described some of the boundaries of the cause requirement, stating:

> a defendant is bound by the tactical decisions of competent counsel . . . and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct . . . .
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests.

Id. at 2909 (citations omitted).

Prejudice may be demonstrated by showing that no evidence, other than the challenged evidence, supports the prisoner's conviction, *see* United States v. Frady, 456 U.S. 152, 172 (1982), and that the errors at trial "worked to his *actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." *Id.* at 170 (emphasis in original). This prong may be a variation of the harmless error doctrine. *Compare* Chapman v. California, 386 U.S. 18, 24 (1967) (on direct appellate review, state has burden of proving the error was harmless) *with* Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (habeas applicant has not shown cause and prejudice) *and id.* at 117 (Brennan, J., dissenting) (noting similarity to harmless error).

Whatever the exact definition of cause and prejudice may be, it has been viewed as a significant barrier to obtaining federal habeas review. *See* Engle v. Isaac, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting). The barrier, however, may have been lowered somewhat by the Court's decision in Reed v. Ross, 104 S. Ct. 2901 (1984), which held that a novel claim may satisfy the cause test. *See id.* at 2910.

However, when a state court "forgives" the default and decides the case solely on the constitutional issue, a federal court may freely entertain the habeas petition.[11]

In *Sykes* the state courts—trial and appellate—did not discuss the merits of the petitioner's constitutional claim, because the claim was never presented on direct review.[12] The Supreme Court acknowledged that, under the circumstances, the claim would have been barred by the state procedural ground.[13] Since *Sykes*, lower federal courts have disagreed over whether the cause and prejudice standard applies in the case of alternative holdings,[14] in which the state court dismisses the petitioner's federal claim due to a procedural default but also reaches and dismisses the federal claim on the merits. Some courts have held that despite the state court's procedural dismissal, *Sykes* does not apply if the state court has also decided the merits of the federal constitutional claim.[15] Others have held that *Sykes* applies if a procedural ground was a substantial basis for the state court's decision.[16] A third group has held that *Sykes* applies whenever the state court finds a procedural default, regardless of whether the merits of the claim were also reached.[17]

When a state court bases its decision on two independent holdings—

11. *See* County Court v. Allen, 442 U.S. 140, 150-51 & nn.8-10, 154 (1979); Castaneda v. Partida, 430 U.S. 482, 485 n.4 (1977); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). The state court in Partida v. State, 506 S.W.2d 209 (Tex. Crim. App. 1974) did not mention the possible procedural problem, but rather discussed only the merits of the constitutional claim. *See id.* at 210-11.

12. *See* Wainwright v. Sykes, 433 U.S. 72, 75 & n.3 (1977).

13. *See id.* at 85-87. The Court further held that if the state court had relied on that procedural ground, that reliance would have barred direct federal review. *See id.* at 86-87.

14. See *infra* note 18 for a definition of alternative holdings.

15. *See, e.g.*, Darden v. Wainwright, 699 F.2d 1031, 1034 & n.4 (11th Cir.), *aff'd by an evenly divided court*, 708 F.2d 646 (11th Cir.) (en banc), *vacated on other grounds*, 715 F.2d 502 (11th Cir. 1983) (en banc), *aff'd in part, rev'd in part on other grounds*, 725 F.2d 1526 (11th Cir.) (en banc), *cert. denied*, 104 S. Ct. 2688 (1984), *vacated on other grounds*, 105 S. Ct. 1158 (1985); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979); Bagwell, *Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits*, 95 F.R.D. 435, 457 (1982).

The Eleventh Circuit presents a unique approach to this problem. In Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3591 (1984), the court stated that an alternative holding is sufficient to trigger the *Sykes* rule. *See id.* at 1524. Nevertheless, in a subsequent case the Eleventh Circuit held that *Sykes* did not bar review, even though it recognized that the state court had made an alternative holding. *See* Darden v. Wainwright, 699 F.2d 1031 (11th Cir.), *aff'd by an evenly divided court*, 708 F.2d 646 (11th Cir.) (en banc), *vacated on other grounds*, 715 F.2d 502 (11th Cir. 1983) (en banc), *aff'd in part, rev'd in part on other grounds*, 725 F.2d 1526 (11th Cir.) (en banc), *cert. denied*, 104 S. Ct. 2688 (1984), *vacated on other grounds*, 105 S. Ct. 1158 (1985). The *Darden* court relied on the fact that the merits of the petitioner's claim was a basis for the state court's decision. *See id.*

16. *See* Dietz v. Solem, 640 F.2d 126, 131-32 & n.1 (8th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

17. *See, e.g.*, Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

one procedural and one substantive, for example—the court's holding is said to be in the alternative.[18] Because both holdings can independently support the court's decision,[19] they each constitute binding precedent.[20] However, if a court fails to state explicitly that its decision is based on two independent holdings, a reviewing court might interpret the opinion as resting on only one.[21]

Assume that the two possible grounds are A—the independent state ground—and B—the federal constitutional ground. The reviewing court can interpret the decision in three different ways. The first interpretation is that A is the sole basis of the state court's decision and that B is dictum.[22] Under this interpretation, the state court's decision is not characterized as an alternative holding because it rests only on A.[23] In this situation, it is generally agreed that *Sykes* applies.[24] A second interpretation is that A and B each independently supports the state court's deci-

18. *See* Phillips v. Smith, 717 F.2d 44, 46-47, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984). "Where the judgment is based upon two alternative grounds, one on the merits and the other not on the merits, there is a decision on both grounds although either alone would have been sufficient to support the judgment . . . ." Restatement of Judgments § 49 comment c (1942).

> If the judgment of the court of first instance was based upon two alternative grounds, either of which would be sufficient to support the judgment, and the appellate court holds that both of these grounds are sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both grounds in a subsequent action on a different cause of action.
>
> If the appellate court determines that one of these grounds is sufficient but that the other is not, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground.
>
> If the appellate court determines that one of these grounds is sufficient and refuses to consider whether or not the other ground is sufficient, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground.

Id. at § 69 comment b (citation omitted).

An alternative holding should be distinguished from an alternative judgment. The alternative holding results in a judgment. That judgment can also be in the alternative—meaning that the party against whom the judgment was entered may satisfy that judgment in one of several ways. *See* Kaybill Corp. v. Cherne, 24 Ill. App. 3d 309, 313-14, 315-16, 320 N.E.2d 598, 602-03, 604 (1974); Donaldson v. Greenwood, 40 Wash. 2d 238, 251-52, 242 P.2d 1038, 1044, 1046 (1952); State v. Wilson, 216 N.C. 130, 133, 4 S.E.2d 440, 442 (1939).

The alternative holding disposes of one issue, but gives two reasons for that disposition. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 439-40 (3rd Cir. 1982). For example, a claim of constitutional immunity against the use of testimony could be dismissed exclusively on the merits or on a procedural basis, or on both grounds.

19. *See* Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); R. Cross, Precedent in English Law 86-87 (3d ed. 1977). See *supra* note 18.

20. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982); R. Cross, *supra* note 19, at 41.

21. *See* R. Cross, *supra* note 19, at 87, 89.

22. *See* Irvin v. Dowd, 359 U.S. 394, 404 (1959). For a complete discussion of this case, see Hart, *The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 108-22 (1959).

23. See *supra* notes 18-20 and accompanying text.

24. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 117, 135 (1982); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

Circuits that hold that a state court opinion must rest exclusively on the procedural ground will apply the *Sykes* test when the state court merely discussed the federal constitutional claim in dictum. *See* Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985); Ratcliff v. Estelle, 597 F.2d 474, 475-76, 478 (5th Cir.), *cert. denied*, 444 U.S. 868 (1979). The Fifth Circuit has stated that the applicable rule is that "'if 'the state courts entertained the federal claims on the merits, a federal habeas corpus court must also determine the merits of the applicant's claim.'" Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), *cert. denied*, 444 U.S. 868 (1979) (quoting Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975)). Discussing the federal claim in dictum is not equivalent to entertaining the federal claim on the merits. See *infra* note 36 and accompanying text. Indeed, the cases cited and discussed by the court in *Ratcliff* do not support the proposition that dictum on a federal issue triggers federal habeas review, regardless of cause and prejudice. *See id.* at 477-78. For instance, in Lefkowitz v. Newsome, 420 U.S. 283 (1975), there was no procedural default. *See id.* at 289-90. The *Newsome* Court stated its holding was "that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding." *Id.* at 293. The footnote in the *Newsome* opinion referred to by the *Ratcliff* Court distinguished Fay v. Noia, 372 U.S. 391 (1963), by pointing out that there was no bypass, deliberate or otherwise, in the *Newsome* case. *See Newsome*, 420 U.S. at 291-92 & n.9. The other case cited was Newman v. Henderson, 425 U.S. 967 (1976), in which the Supreme Court vacated the lower court's judgment, citing *Newsome*, 420 U.S. at 292 n.9, and Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976). *Newsome* has already been discussed. The footnote in *Francis* referred to by the Supreme Court says in its entirety: "In a case where the state courts have declined to impose a waiver but have considered the merits of the prisoner's claim, different considerations would, of course, be applicable. See *Lefkowitz v. Newsome*, 420 U.S. 283." Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976). Since the lower federal courts applied a procedural bar when the state courts had not, the Supreme Court's holding did not allow a federal court to disregard a state court's holding that no default existed when that holding forgave a procedural default and went on to the merits of petitioner's federal claims. Other cases pointed to by *Ratcliff* involved holdings on the merits and dictum as to procedural grounds. *See Ratcliff*, 597 F.2d at 477-78. Finally, the state court in *Ratcliff* discussed the federal issue in dictum, and squarely held that that claim was barred by a procedural default. *See id.* at 478. Thus, the Fifth Circuit will apply the *Sykes* rule when the state court discusses the federal ground in dictum, but nonetheless holds the claim barred by a procedural default.

The Eleventh Circuit similarly imposes the *Sykes* rule when the state court merely comments in dictum on the federal claim, but holds on the procedural ground. *See, e.g.*, Hall v. Wainwright, 733 F.2d 766, 777-78 (11th Cir. 1984) (*Sykes* applied despite the state court's discussion of the merits); Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983) ("where a state court clearly and correctly applies a procedural default rule, *Sykes* requires the federal court to abide by the state court's decision even though the state court discusses the merits as an alternate ground for rejecting a claim"), *cert. denied*, 104 S. Ct. 3591 (1984).

The Tenth Circuit similarly applies the *Sykes* rule despite the state court's comments in dictum on the federal constitutional issue. *See* Runnels v. Hess, 653 F.2d 1359, 1363 (10th Cir. 1981). In *Runnels*, the state appellate court noted that the prosecutor improperly directed the attention of the jury to the defendant's failure to testify, but held that the claim was barred by a procedural default. *See* Runnels v. State, 562 P.2d 932, 937 (Okla. Crim. App. 1977), *cert. denied*, 434 U.S. 893 (1977).

Circuits holding that *Sykes* applies if the state court's decision was substantially based on a procedural ground also apply *Sykes* when the federal constitutional discussion is dictum. *See* Dietz v. Solem, 640 F.2d 126, 131-32 & n.1 (8th Cir. 1981) (state court held on procedural ground and its discussion of federal issue was dictum); Hockenbury v.

sion,[25] and, therefore, A and B are both binding precedent. Here, the state court's decision is properly characterized an alternative holding,[26] and the courts are divided as to whether *Sykes* applies.[27] A third interpretation is that the procedural ground A is dictum and that the federal ground B is the sole basis of the opinion.[28] Again, this is not an alternative holding because the state court's decision is interpreted as resting only on B.[29] In this case, it is generally agreed that *Sykes* does not apply.[30]

These three possiblities assume that the federal reviewing court can reasonably interpret the state court's opinion. Some opinions, however, are not easily susceptible to interpretation. A classic example is the summary affirmance, in which the state court fails to give any reasons for its decision.[31] In this situation, the federal courts are again split as to whether *Sykes* applies.[32]

Part I of this Note discusses the application of the *Sykes* cause and prejudice test when the state court bases its decision on only one ground—substantive or procedural—and discusses the other in dictum. Part II examines whether the *Sykes* test should also apply when the state court's holding is based on independent and adequate state procedural grounds as well as on federal constitutional grounds—the alternative holding. Part III discusses the inappropriateness of applying the *Sykes* standard when the basis of the state court's holding is unclear.

This Note concludes that if a state court decides a claim against the defendant on adequate and independent procedural grounds, the *Sykes* cause and prejudice test should apply regardless of any further comments by that court on the federal constitutional ground. Thus, *Sykes* should apply to alternative holdings. However, when the state court forgives the default, decides the case solely on a federal constitutional issue or fails to clearly identify the basis of its holding, the federal habeas court should review the state court's holding without regard to the *Sykes* cause and prejudice standard.

Sowders, 620 F.2d 111, 115-16 (6th Cir. 1980) (state court held substantially on procedural ground, but also discussed merits), *cert. denied*, 450 U.S. 933 (1981).

25. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 437, 440 (3d Cir. 1982).

26. See *supra* notes 18-20 and accompanying text.

27. See *supra* notes 15-17 and accompanying text.

28. *See* Irvin v. Dowd, 359 U.S. 394, 406 (1959).

29. See *supra* notes 18-20 and accompanying text.

30. See *infra* note 57 and accompanying text.

31. *See, e.g.*, Memoranda, February 1980, 74 A.D.2d 738, 738-41 (162 judgments affirmed without opinion, dated from February 4, 1980 to February 28, 1980). A summary affirmance, for the purposes of this Note, is an affirmance without opinion.

32. See *infra* note 118 and accompanying text.

I. The Application of the *Sykes* Standard when the State Court's Decision is Based on Only One Ground

Although two grounds for deciding an issue may exist, the state court may choose to rely on only one. It may decide the case on an available procedural ground, and comment in dictum on the federal issue. In contrast, it can choose to decide the case on the merits of the federal claim, and comment in dictum that the claim could have been precluded by a procedural default.

A. *The Procedural Ground Is the Basis of the State Court's Decision and Its Discussion of the Federal Issue Is Dictum*

In *Wainwright v. Sykes*,[33] the Supreme Court held that when a state court has not resolved or ruled on a federal constitutional claim based on a procedural default in state court, a federal court may not grant habeas relief absent a showing of cause and prejudice.[34] In light of *Sykes*' strict language, the suggestion that any state court's comment on a federal issue, even dictum, suffices to open federal habeas review is untenable for several reasons.[35] First, when a federal habeas court decides that the state court's comments concerning the merits of petitioner's constitutional claim are dictum, the state court has not resolved or adjudicated the federal issue.[36] Thus, *Sykes* properly applies.[37] Moreover, the Supreme Court has repeatedly held that state procedural defaults alone can preclude federal review of the merits of a criminal conviction despite the petitioner's later assertions of constitutional violations.[38] Indeed, a state court need not even discuss a constitutional claim if that claim is "waived" or "defaulted" because of the violation of a valid procedural rule.[39] Thus, when a state court considers the constitutional issue in dictum but dismisses the claim on a state procedural ground that would bar direct Supreme Court review, the *Sykes* rule should apply in full force.

Concern that state courts will "hide behind" procedural grounds to defeat federal rights is unfounded. Not all procedural grounds constitute adequate and independent state grounds.[40] The resolution of this issue is

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33. 433 U.S. 72 (1977).

34. *See id.* at 86-87. See *supra* note 10 for a discussion of cause and prejudice.

35. In the absence of that comment, habeas review would be unavailable without a showing of cause and prejudice. See *supra* note 10 and accompanying text.

36. *See* Garvey v. Trew, 64 Ariz. 342, 350, 170 P.2d 845, 850, *cert. denied*, 329 U.S. 784 (1946); People v. Case, 220 Mich. 379, 382-83, 190 N.W. 289, 290 (1922); Winn v. Warner, 193 S.W.2d 867, 881 (Tex. Civ. App.), *rev'd on other grounds*, 145 Tex. 302, 197 S.W.2d 338 (1946).

37. See *supra* note 24 and accompanying text.

38. *See* Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 110, 124-25 (1982); Wainwright v. Sykes, 433 U.S. 72, 75, 86-87 (1977); Francis v. Henderson, 425 U.S. 536, 538, 542 (1976); Henry v. Mississippi, 379 U.S. 443, 446-52 (1965); Fay v. Noia, 372 U.S. 391, 428-29 (1963).

39. *See* Edelman v. California, 344 U.S. 357, 358-59 (1953); Herndon v. Georgia, 295 U.S. 441, 442-43 (1935); Parker v. Illinois, 333 U.S. 571, 573-74 (1948).

40. *See* Hill I, *supra* note 2, at 944-53. Examples of procedural rules that will not bar

a federal question which a federal habeas court is competent to decide.[41] If a state court denies the federal constitutional claim on an inadequate state ground it risks having the conviction vacated on federal habeas review.[42] Considering the potentially overwhelming problems of retrial,[43] a prosecutor should be loath to rely on inadequate state procedural grounds.[44] Further, the *Sykes* rule will not bar federal review should the petitioner show cause and prejudice.[45] This exception was designed in part to prevent miscarriages of justice.[46] Therefore, if the state unreasonably invokes a procedural rule to prevent the defendant from asserting a constitutional claim, the federal court might properly find a miscarriage of justice amounting to cause and prejudice.[47]

federal review of federal constitutional claims include a default rule that is inconsistently applied, rules that are unconstitutional, rules that are newly created to bar the federal claim and overly technical rules of local practice. See *supra* note 2.

41. *See* Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Walker v. Engle, 703 F.2d 959, 966 & n.10 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 396 (1984); Alderman v. Austin, 663 F.2d 558, 561 n.4 (5th Cir. 1982); Breest v. Perrin, 655 F.2d 1, 2-3 & n.1 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981); *In re* Kravitz, 488 F. Supp. 38, 45 (M.D. Pa. 1979); L. Yackle, *supra* note 3, § 84, at 144 (Cum. Supp. 1985); *cf.* Parker v. Illinois, 333 U.S. 571, 574-75 (1948) (rule same on direct review); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920) (same).

42. *See* Walker v. Engle, 703 F.2d 959, 966-67 & nn.10-11 (6th Cir. 1983) (asserted procedural bar by state court that has no basis in fact or law will not bar federal review), *cert. denied*, 104 S. Ct. 396 (1984); Kozerski v. Smith, 555 F. Supp. 212, 216-18 (D.N.H. 1983) (indigent's failure to notarize motion claiming indigency due to inability to pay notary fee is not adequate to bar federal habeas review).

43. See *infra* notes 106-08 and accompanying text for a discussion of these problems. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Forman v. Smith, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970).

44. *Cf.* Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (prosecutor may avoid using testimony that may result in reversal on direct appeal or in federal habeas relief).

45. *See id.* at 87. *Sykes* does not preclude all review of a claim merely because there has been a procedural default. Rather, the claim may still be considered on the merits if the petitioner can demonstrate cause and prejudice. *See* Reed v. Ross, 104 S. Ct. 2901, 2906-07 (1984). See *supra* note 10.

46. *See id.* at 90-91.

47. *See* Engle v. Isaac, 456 U.S. 107, 135 (1982) ("we are confident that victims of a fundamental miscarriage of justice will meet the cause—and—prejudice standard"); Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983) (states will not sacrifice federal constitutional rights "because the cause and prejudice test allows for federal habeas review, despite a procedural default, to prevent a fundamental miscarriage of justice"), *cert. denied*, 104 S. Ct. 1287 (1984); Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. 1981) (explaining that Fifth Circuit defines cause to protect "defendants who have not strategically withheld constitutional objections in state court proceedings from the possibility of injustice"); Hill II, *supra* note 10, at 1076-78 (listing factors which might guide a finding of a miscarriage of justice). *But see* Engle v. Isaac, 456 U.S. 107, 129 (1982) (*Sykes* test is not limited to constitutional errors which impair truthfinding—implying that cause and prejudice might block habeas review despite petitioner's possible innocence).

Moreover if the state court asserts a procedural default which is "an obvious subterfuge to evade consideration of a federal issue," this will not constitute an adequate state ground. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); *see* Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975); Williams v. Georgia, 349 U.S. 375, 382-83, 389

Finally, post-*Sykes* cases compel the conclusion that *Sykes* applies if the state court dismissed the claim on adequate and independent procedural grounds, although it also discussed the federal constitutional claim in dictum. For example, in *County Court v. Allen*,[48] although the state court had addressed the merits of the constitutional claim,[49] the Supreme Court on habeas review nevertheless searched the record to determine whether the state court had relied on a procedural default.[50] The Court indicated that such a ground would have triggered the *Sykes* cause and prejudice test.[51] Therefore, a state court may comment in dictum on the merits of the constitutional claim without subjecting the conviction to federal habeas review if its actual holding is based solely on an adequate and independent state procedural ground.

B. *The Constitutional Ground Is the Basis of the State Court's Decision and Its Discussion of the Procedural Ground Is Dictum*

When a federal habeas court interprets a state court's holding as resting on the constitutional basis, with the consideration of the procedural ground either reduced to dictum or the default forgiven, habeas review is available for two reasons. First, when the state court's holding is based solely on the merits of the federal ground, the rule of *Brown v. Allen*[52] entitles the petitioner to federal habeas review of his federal contention because that claim is not barred by a procedural default.[53]

Second, as discussed earlier, the scope of direct review with respect to adequate and independent state procedural grounds parallels the *Sykes* habeas corpus rule.[54] The *Sykes* standard applies only when an adequate and independent state procedural ground would block direct review.[55] When a state procedural ground is not relied on or is forgiven, direct federal review is not barred,[56] and *Sykes* does not apply.[57]

(1955). Finally, if the asserted state ground is not adequate, the *Sykes* bar does not apply. See *supra* notes 17-19 and accompanying text.

48. 442 U.S. 140 (1979).

49. *See id.* at 145-46.

50. *See id.* at 149-54.

51. *See id.* at 148-49.

52. 344 U.S. 443 (1953). See *infra* notes 73-78 and accompanying text.

53. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

54. See *supra* note 10.

55. See *supra* notes 10, 41-42.

56. *See* United Air Lines, Inc. v. Mahin, 410 U.S. 623, 630-31 (1973); Beecher v. Alabama, 389 U.S. 35, 37 n.3 (1967) (per curiam); Irvin v. Dowd, 359 U.S. 394, 406 (1959); International Steel & Iron Co. v. National Sur. Co., 297 U.S. 657, 665-66 (1936); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982). On direct review, if the Supreme Court reverses the state court's federal determination, the case will be remanded to the state court for determination of the state issue. *See* Orr v. Orr, 440 U.S. 268, 283-84 (1979); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 98, 109 (1938).

57. *See* County Court v. Allen, 442 U.S. 140, 154 (1979); Corn v. Zant, 708 F.2d 549, 555 n.2 (11th Cir. 1983); *cert. denied*, 104 S. Ct. 2670 (1984); Walker v. Engle, 703 F.2d

II. The Application of *Sykes* to Alternative Holdings Based on State Procedural and Federal Constitutional Grounds

When a federal habeas court interprets a state court's decision as an alternative holding based on state procedural grounds and on federal constitutional grounds, the *Sykes* cause and prejudice standard should apply[58] as long as the state procedural ground is adequate and independent.[59] As a matter of procedure, most courts hold that to reverse a conviction based on alternative grounds, both grounds must be negated.[60] If only one of the grounds is erroneous, the conviction may stand on the other ground.[61] Similarly, because a state judgment may stand on a procedural ground, the federal court must in some way overrule or disregard that ground before it can issue a writ of habeas corpus.[62] Otherwise fed-

959, 966 & n.10 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 396 (1984); Booker v. Wainwright, 703 F.2d 1251, 1255 (11th Cir.), *cert. denied*, 104 S. Ct. 290 (1983); Bell v. Watkins, 692 F.2d 999, 1004 (5th Cir.), *cert. denied*, 104 S. Ct. 142 (1983); United States *ex rel.* Ross v. Franzen, 688 F.2d 1181, 1183 (7th Cir. 1982) (en banc); Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982); Dietz v. Solem, 640 F.2d 126, 131-32 (8th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); Brinlee v. Crisp, 608 F.2d 839, 857 & n.13 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

The Supreme Court has stated that when a state court does not rely on an available state ground, the federal habeas court should not bar review on the basis of that state ground. *See* Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Irvin v. Dowd, 359 U.S. 394, 406 (1959).

58. *See* Phillips v. Smith, 717 F.2d 44, 48-49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440-41 (3d Cir. 1982).

59. See *supra* notes 40-42 and accompanying text.

60. *See* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (if a state court decision rests on two grounds, one of which could be reversed by the Supreme Court, the same judgment will be rendered if the other ground remains as an adequate and independent state ground); Wright v. Georgia, 373 U.S. 284, 287-89 (1963) (state decision seemed to rest on both merits and on procedural default, Supreme Court held procedural ground inadequate and reversed state court's holding on merits, reversing the conviction); *cf.* Restatement of Judgments § 49 comment c, § 69 comment b (1942) (a civil judgment based on alternative grounds will stand if one ground is overruled, but the other ground is left standing).

61. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983) (state criminal conviction will stand regardless of Supreme Court's disposition of the federal issue if the conviction rests alternatively on adequate state grounds); *cf.* Benton v. Maryland, 395 U.S. 784, 787-89 (1969) (when appellant is sentenced to concurrent sentences, prisoner will serve one sentence even if other is reversed); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196-97 (1965) (civil judgment will stand on alternative ground); Halpern v. Schwartz, 426 F.2d 102, 105-06 (2d Cir. 1970) (same); Markoff v. New York Life Ins. Co., 369 F. Supp. 308, 313 (D. Nev. 1973) (same), *aff'd*, 530 F.2d 841 (9th Cir. 1976); Restatement of Judgments § 49 comment c, § 69 comment b (1942) (same); Restatement (Second) of Judgments § 27 comment i (1982) (same); 46 Am. Jur. 2d, *Judgments* § 463 (1969) (same); Annot., 157 A.L.R. 1038, 1045 (1945) (same).

62. *See* Fay v. Noia, 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982). See *infra* note 63 and accompanying text.

eral habeas "relief" will constitute nothing but an advisory opinion,[63] and the alternative state procedural ground will not be negated. At best, all that a federal decision would accomplish under these circumstances would be the correction of an erroneous state view of federal law, a view that was not essential to the state holding.

It is well settled that a federal court may not overrule a state procedural holding on state law grounds.[64] The federal court must therefore negate the state ground as a matter of federal law.[65] If it rules that the state ground is not adequate and independent, it would have the discretion to entertain the habeas petition.[66] An alternative holding based on federal law and inadequate state procedural grounds would then be reviewable without a showing of cause and prejudice. This Note assumes, however, that the state procedural ground is adequate and independent.

The federal court could acknowledge the existence of the state procedural ground but choose to "overlook" it, so that it will not block the issuance of the federal writ.[67] This was the case in *Fay v. Noia*,[68] when the Court held that a federal habeas court could overlook the procedural

63. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); *see also* Fay v. Noia, 372 U.S. 391, 429 (1963) (federal question would be moot or opinion would be advisory); J. Nowak, R. Rotunda & J. Young, *supra* note 2, at 95 (arguing that the proper rationale for refusing to decide the case is mootness). For discussions of advisory opinions, see generally *id.* at 61-64; L. Tribe, American Constitutional Law § 3-10, at 56-57 (1978); C. Wright, *supra* note 2, § 12, at 57-58.

64. *See* Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975); Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Edelman v. California, 344 U.S. 357, 358-59 (1953); Fox Film Corp. v. Muller, 296 U.S. 207, 209-10 (1935); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1874); Breest v. Perrin, 495 F. Supp. 287, 290 & n.6 (D.N.H. 1980), *aff'd*, 655 F.2d 1 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981); C. Wright, *supra* note 2, § 107, at 747; Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 504 (1954).

However, the Supreme Court will review the state court disposition of the state ground if that decision appears to be an "obvious subterfuge to evade consideration of a federal issue." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); *see* Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975); Williams v. Georgia, 349 U.S. 375, 382-83, 389 (1955); Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932); Davis v. Wechsler, 263 U.S. 22, 24 (1923).

This exception is paralleled in habeas corpus by the provisions of 28 U.S.C. § 2254(d)(8) (1982), which provide for new findings of fact if the state court's factual determination is not fairly supported by the evidence. *See id.*; *see also* Sumner v. Mata, 449 U.S. 539, 549-50 (1981) (discussing application of § 2254(d)).

65. See *supra* note 3 and accompanying text.

66. *See, e.g.*, Walker v. Engle, 703 F.2d 959, 966-67 & nn.10-11 (6th Cir. 1983) (asserted procedural bar by state that has no support in fact or law is inadequate), *cert. denied*, 104 S. Ct. 396 (1984); Breest v. Perrin, 655 F.2d 1, 2 & n.1 (1st Cir.) (contemporaneous objection rule is adequate), *cert. denied*, 454 U.S. 1059 (1981); *In re* Kravitz, 488 F. Supp. 38, 45 (M.D. Pa. 1979) (ordering hearing as to adequacy of state ground).

67. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115-16 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

68. 372 U.S. 391 (1963).

default unless it was intentional.[69] To the extent that *Noia* was willing to ignore the state procedural ground without a separate showing of cause and prejudice by the defendant, however, it has since been limited by *Sykes*.[70] A federal court may no longer overlook the procedural aspect of an alternative holding unless it can demonstrate that *Sykes* was not meant to apply to alternative holdings. In short, the federal court must determine whether, in the case of an alternative holding, it can overlook the procedural default without requiring the petitioner to show cause and prejudice.

The *Sykes* rule can be read in two ways. A narrow interpretation is that cause and prejudice must be shown if and only if the state court, because of the procedural default, makes no comment on the federal constitutional issue.[71] Thus, *Sykes* would not apply whenever the state court rules on the merits of the constitutional claim, regardless of its disposition of the procedural ground. A broader interpretation of the *Sykes* rule, however, is that the cause and prejudice standard applies whenever a state court relies on an adequate and independent state ground.[72] This interpretation would allow the state court to rule on both the federal and state issues without exposing the conviction or the federal issue to federal habeas review.

At first blush, the language of *Sykes* appears to support the narrow interpretation. Closer analysis, however, suggests that the Court had the broader interpretation in mind. For example, when referring to *Sykes'* effect on the rule of *Brown v. Allen*,[73] the *Sykes* Court stated that "we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure."[74] Arguably, this language indicates that *Sykes* should not apply to alternative holdings. However, immediately prior to this statement the Court identified the rule of *Brown v. Allen*[75] as guaranteeing a state prisoner independent federal habeas review of his federal constitutional claim irrespective of the state court interpretation of that issue.[76] The rule of *Brown v. Allen* thus guarantees

69. *See id.* at 433-34. See *supra* note 3.

70. *See* Wainwright v. Sykes, 433 U.S. 72, 86-88 & n.12 (1977).

71. *See* Lowery v. Estelle, 696 F.2d 333, 342 n.28 (5th Cir. 1983); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

72. *See* Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982); *see also* Jones v. Jago, 701 F.2d 45, 47 n.2 (6th Cir. 1983) (when alternative holding exists, the procedural ground can be a substantial basis of the decision sufficient to meet the Sixth Circuit's "substantial basis" test), *cert. denied*, 104 S. Ct. 274 (1984).

73. 344 U.S. 443 (1953).

74. Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (emphasis in original).

75. 344 U.S. 443 (1953).

76. *See Sykes*, 433 U.S. at 87. The opinion states:

> [S]ince *Brown v. Allen* . . . it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule of *Brown v. Allen* is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure.

Id. (citation omitted) (emphasis in original).

77. *See Sykes*, 433 U.S. at 82; *Brown*, 344 U.S. at 485-86.

78. *Brown*, 344 U.S. at 485-87; *see Sykes*, 433 U.S. at 82. In a companion case to *Brown*, the petitioner was denied federal habeas review due to a procedural default. *Brown*, 344 U.S. at 485-87.

79. 372 U.S. 391 (1963).

80. 344 U.S. 443 (1953).

81. *See* Wainwright v. Sykes, 433 U.S. 72, 79 (1977).

82. See *supra* notes 73-78 and accompanying text.

83. Fay v. Noia, 372 U.S. 391 (1963).

84. *See id.* at 398-99, 438.

85. *See Sykes*, 433 U.S. at 87.

86. *Id.* at 91.

independent federal habeas review when an adequate, independent state procedural ground does not exist to bar such review.[77] It was not intended to guarantee federal review simply because the state court discussed the federal issue. Indeed, *Brown* held explicitly that an adequate and independent state procedural ground would bar federal habeas relief.[78] Thus, *Sykes'* discussion of *Brown* is properly read as reaffirming the existence of independent federal habeas review of federal constitutional claims when there exists no adequate state procedural ground barring such review. It does not limit the use of the adequate and independent state ground doctrine in habeas corpus proceedings.

The *Sykes* Court also did not read *Brown v. Allen*[79] as having been modified by *Fay v. Noia*.[80] *Sykes* stated that *Brown v. Allen* guaranteed independent federal habeas review of *dispositive* federal issues,[81] which in the context of *Brown* did not include alternative holdings when one ground was an adequate and independent state procedural ground.[82] Under *Noia*,[83] any federal issue, dispositive or not, guaranteed federal habeas review absent a deliberate bypass.[84] Moreover, *Sykes* explicitly rejected the *Noia* rule, which allowed the federal habeas court to ignore the state procedural ground, unless a deliberate bypass was shown.[85] It therefore read *Brown* independently of *Noia*.

A second example of ambiguous language in *Sykes* is the Court's statement that "the [cause and prejudice] rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant."[86] One might argue this language implies that the rule is inapplicable to review of a conviction when the state court has adjudicated the claim, albeit in the alternative. The sentence continues, however, adding, "who in the absence of such an adjudication will

be the victim of a miscarriage of justice."[87] An accurate rewording of this statement is that a state prisoner who is the victim of a miscarriage of justice will not be barred from federal habeas review despite his default. Thus, in the case of alternative holdings, the state court's holding on procedural grounds should block federal habeas review unless the petitioner can demonstrate cause and prejudice or that the state's reliance on the procedural ground results in a miscarriage of justice. The statement does not indicate that the Court intended to immunize alternative holdings from its decision; rather, it merely reaffirms that the cause and prejudice standard is flexible enough to deal with those isolated cases in which a miscarriage of justice might have occurred. Therefore, rather than showing that *Sykes* applies only when the state court has not adjudicated the federal claim, this statement is one example of the use of the cause and prejudice standard.

Moreover, the Court has held that when a state conviction is based on adequate and independent state grounds sufficient to bar direct federal review, federal habeas review will be available only after a showing of cause and prejudice.[88] An alternative holding is immune from direct federal review if it is based on adequate and independent state grounds.[89] If such a holding is sufficient to bar completely direct review, it would a fortiori be sufficient to bar habeas review unless the *Sykes* test is met.

Finally, the policies emphasized by the Court in *Sykes* compel its application to alternative state holdings. In *Sykes* and subsequent habeas decisions, the Burger Court has emphasized the need to protect systemic interests over and above individual liberties.[90] Applying the cause and prejudice test to alternative holdings protects these systemic interests. Allowing free habeas review would injure them.

A major interest furthered by *Sykes* is respect for coordinate units of

87. *Id.* The full text reads:

> The "cause"-and-"prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.

Id. at 90-91.

88. *See id.* at 86-87. See *supra* note 10.

89. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 489 (1965); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 281 (1961); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871). See *supra* note 2.

90. *See, e.g.*, Reed v. Ross, 104 S. Ct. 2901, 2915 n.3 (1984) (Rehnquist, J., dissenting); *see also id.* at 2907-08 (accuracy, efficiency and finality dictate that "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo [sic] the exercise of its habeas corpus power.") (quoting Francis v. Henderson, 425 U.S. 536, 539 (1976)); Engle v. Isaac, 456 U.S. 107, 126-28 (1982) (protection of finality, the role of trial, ability to punish offenders, federalism); Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977) (protection of finality, comity, role of trial).

the federal and state judicial systems.[91] This policy is based on comity and is seriously undermined if *Sykes* is not applied to alternative holdings. For instance, a federal court shows disrespect for a state rule if it is allowed to disregard an adequate and independent state procedural rule that is part of an alternative holding.[92] In *Sykes*, the Supreme Court stressed that such rules should be respected by the federal courts.[93] By applying cause and prejudice to alternative grounds, full respect and effect are given to state procedural rules, thus promoting comity.

A second systemic policy furthered by *Sykes* is the promotion of finality of litigation.[94] *Sykes* forces the defense to raise all issues at trial or risk a procedural default.[95] This furthers accuracy of results at trial and general judicial efficiency.[96] Accuracy is maximized because all issues are placed before the trier of fact, enabling it to make an informed decision.[97] Applying *Sykes* to alternative holdings would encourage defense counsel to contest all issues at trial, or risk losing them both on direct appeal and habeas review.[98]

In addition, if *Sykes* is not applied to alternative holdings, state courts may stop writing opinions with alternative holdings. If an adequate and independent state procedural ground exists, a state court may decide to limit its decision solely on that ground in order to avoid federal habeas review.[99] Placing the state courts in this dilemma violates comity because it unnecessarily discourages them from exercising their full juris-

91. *See* Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984); Engle v. Isaac, 456 U.S. 107, 128 (1982); Wainwright v. Sykes, 433 U.S. 72, 88 (1977); Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); Forman v. Smith, 633 F.2d 634, 639-40 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

92. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting); Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

93. *See Sykes*, 433 U.S. at 88.

94. *See Sykes*, 433 U.S. at 88-90. This policy has been recognized by subsequent courts. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 126-27 & n.31 (1982); Phillips v. Smith, 717 F.2d 44, 48-49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 441 (3d Cir. 1982); *cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 261-63 (1973) (Powell, J., concurring) (finality is furthered by cutting off all review of fourth amendment claims).

95. *See Sykes*, 433 U.S. at 89-91. Subsequent courts have also recognized this effect. *See* Engle v. Isaac, 456 U.S. 107, 127 (1982); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

96. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127 (1982); *Sykes*, 433 U.S. at 90.

97. *See Sykes*, 433 U.S. at 90; Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 442 (3d Cir. 1982).

98. *See* Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

99. *See id.* at 51; United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

diction[100] and unjustifiably restricts their freedom in writing decisions.[101] Furthermore, because alternative holdings promote efficiency and finality of litigation, they should be encouraged rather than discouraged.[102] An alternative holding allows a lower court to resolve a case on all possible grounds, thus providing the appellate court with findings on all possible dispositions of the issues before it. If it turns out that one of the grounds is erroneous, the appellate court can affirm the judgment on the alternative ground,[103] thus promoting efficiency and finality. On the other hand, if the alternative holding is not made, the appellate court must remand the case to the lower court for determination of the other ground[104]—a time consuming procedure. Finally, alternative holdings should be encouraged because they contribute to the development of the jurisdiction's precedents and law, thus providing maximum guidance to the lower courts.[105]

A final systemic policy asserted by the Burger Court for limiting the exercise of federal habeas corpus jurisdiction is that it deprives society of the right to punish the guilty.[106] While it is true that the state can retry the successful habeas petitioner, often habeas relief comes years after the original trial. As time passes, memories fade and witnesses become difficult to locate. In such cases retrial is effectively impossible and the state is forced to simply let the petitioner go.[107] The limits placed by the Burger Court on habeas review have reduced this undesirable result.[108] The necessity of freeing guilty prisoners would be reduced even further if *Sykes* is applied to alternative holdings.

In *Fay v. Noia*,[109] the Warren Court noted several policies that support unlimited federal habeas review of alternative holdings. These policies did not survive the Burger Court's decision in *Sykes*, however, and therefore do not allow a federal habeas court to disregard a state procedural

100. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d at 440.

101. *See* Hall v. Wainwright, 565 F. Supp. 1222, 1233 (M.D. Fla. 1983), *aff'd in part, rev'd in part on other grounds*, 733 F.2d 766 (11th Cir. 1984).

102. *See* Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

103. See *supra* notes 18-20 and accompanying text.

104. *See* Orr v. Orr, 440 U.S. 268, 274, 283 (1979); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 109 (1938).

105. *Cf.* Ramirez v. Jones, 683 F.2d 712, 718 (2d Cir. 1982) (Leval, J., concurring) (state court may reach the merits despite procedural default to provide guidance to lower courts), *cert. denied*, 460 U.S. 1016 (1983); R. Cross, *supra* note 19, at 41 (dictum provides guidance).

106. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Stone v. Powell, 428 U.S. 465, 490 (1976).

107. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Rules Governing § 2254 Cases in the United States District Courts, Rule 9 advisory committee note (1982) (appearing after 28 U.S.C. § 2254 (1982)); Friendly, *supra* note 43, at 146-47.

108. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); *see also* Stone v. Powell, 428 U.S. 465, 490 (1976) (possibility of freeing the guilty is a reason to bar fourth amendment claims from federal habeas review).

109. 372 U.S. 391 (1963)

holding. One of the policies advanced in *Noia* was that imprisonment in violation of a petitioner's constitutional rights, whether or not properly presented, was intolerable.[110] A second policy was that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[111] A related concern of the Warren Court was that federal courts are better able to protect and are more receptive to the assertion of federal rights.[112]

These policies, however, retain little vitality in the wake of *Sykes* and subsequent habeas corpus cases. The Burger Court has consistently held that procedural defaults of federal rights should be respected absent a showing of cause and prejudice.[113] Therefore, *Sykes* and its progeny imply that it is entirely tolerable for a petitioner to be imprisoned despite the fact that his federal claim might have produced an acquittal or a reversal if it had been properly raised.[114] Similarly, by requiring a showing of cause and prejudice, the Burger Court has indicated that the policy of affording federal review of federal claims must be balanced against the countervailing policy of respecting valid state procedural rules.[115] Moreover, the Burger Court has explicitly rejected the idea that state courts are less able or willing to enforce federal rights.[116] Therefore, although applying the cause and prejudice test to alternative holdings offends the policies of *Noia*, those policies have been largely replaced, if not eviscerated, by *Sykes*.

The policies expressed by the Burger Court suggest the application of *Sykes* to alternative holdings. Under *Sykes*, the federal habeas court may no longer blithely overlook or overrule independent state procedural grounds. Accordingly, it should deny habeas review unless cause and prejudice is shown.

III. THE PROBLEM OF THE UNCLEAR HOLDING: SHOULD *SYKES* APPLY?

Unfortunately, state courts often fail to identify clearly the bases for

110. *See id.* at 401-02; Friendly, *supra* note 43, at 149-50; *see also* Sanders v. United States, 373 U.S. 1, 8 (1963) (approving policy advanced in *Noia*).

111. *Noia*, 372 U.S. at 424.

112. *See* Kaufman v. United States, 394 U.S. 217, 225-26 (1969); Friendly, *supra* note 43, at 154-55. *But see* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (Burger Court rejecting argument that federal courts are better able to and more willing to protect federal rights).

113. *See, e.g.*, Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Francis v. Henderson, 425 U.S. 536, 542 (1976).

114. *See* Wainwright v. Sykes, 433 U.S. 72, 87, 88-89 (1977).

115. *See* Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984); Wainwright v. Sykes, 433 U.S. 72, 88 (1977).

116. *See* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

their decisions.[117] In such a situation, should *Sykes* apply? Federal courts have not answered this question uniformly.[118] For instance, the Second Circuit in *Martinez v. Harris*[119] stated that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on the procedural ground, if the prosecutor argued procedural default to the state court, even if the constitutional claim was argued on the merits.[120] This assumption mandates application of *Sykes*, which is unsatisfactory for several reasons.[121] First, the Court in *Sykes* explicitly stated that the *Brown v. Allen* right to federal review of dispositive federal constitutional issues remained undisturbed.[122] Under *Martinez*, this personal right may be sacrificed on the altar of systemic interests even when no such interests exist or are unclear in a particular case.[123] The *Martinez* approach discounts the possibility that the state court's affirmance may be on the merits of the federal grounds alone, which would entitle the petitioner to federal habeas review under the rule of *Brown v. Allen*.[124] The court's reasoning in *Martinez* allows a state court to block federal habeas review by merely affirming without opinion in any case in which the prosecution raises the issue of procedural default.[125] This is impermissible.[126] The *Sykes* Court's reaffirmance of the rule of *Brown v. Allen* indicates that the Court did not intend to limit habeas review so radically.[127]

Second, the *Martinez* rule assumes that an adequate and independent state procedural ground exists whenever the prosecutor argues a procedural issue to the state court.[128] This approach is intolerable because, in

117. See *supra* notes 31-32 and accompanying text. *Compare* Jerome Hat Corp. v. Lou Temco Uniforms, Inc., 74 A.D.2d 745, 745, 425 N.Y.S.2d 255, 255 (1980) (mem.) (affirming on the basis of the opinion below) *with* People v. Salerno, 74 A.D.2d 745, 745 (1980) (mem.) (affirming without opinion).

118. *Compare* County Court v. Allen, 442 U.S. 140, 147-54 (1979) (searching record and state law for procedural default) *with* Campbell v. Wainwright, 738 F.2d 1573, 1578 (11th Cir. 1984) (assuming procedural default when prosecutor argues merits and procedure alternatively) *and* Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.) (same), *cert. denied*, 459 U.S. 849 (1982) *with* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (when state court record is unclear, federal courts will assume state court held on merits) *and* Williams v. Zahradnick, 632 F.2d 353, 357, 359-60 (4th Cir. 1980) (same).

119. 675 F.2d 51 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

120. *See id.* at 54.

121. *See* Martinez v. Harris, 675 F.2d 51, 55 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

122. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

123. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

124. See *supra* note 123.

125. *See* Henry v. Wainwright, 686 F.2d 311, 314 & n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983).

126. *Cf.* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (similar reasoning in direct review) (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

127. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

128. *See* Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). As a result of *Martinez*, any New York prosecutor may now assert a procedural

the event of a summary affirmance, it allows the prosecutor to defeat the petitioner's right to federal habeas review without proving that the state court relied on a procedural ground, and that the ground was both adequate and independent.

In the recent decision of *Hawkins v. LeFevre*,[129] the Second Circuit expressed its dissatisfaction with the *Martinez* rule and its unjust results.[130] In *Hawkins*, the prosecutor only argued the merits and the state appellate court affirmed the conviction without opinion.[131] On habeas review, the federal district court, citing *Martinez*, held that Hawkins was barred from habeas review due to a procedural default.[132] In reversing the district court, the *Hawkins* court stated that "[t]he scope of . . . *Martinez* . . . does not extend to all factual situations and, in particular, does not control the instant action."[133]

Curiously, the panel could have reached the same result by merely citing *Washington v Harris*,[134] which provides that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on constitutional grounds when the prosecutor argued solely on the merits.[135] The *Hawkins* Court's criticism of the district court's application of *Martinez* indicates that the Second Circuit may no longer be willing to apply automatically *Martinez* whenever the prosecutor argues a procedural default to the state appellate court. Indeed the court stated "[w]e choose not to extend *Martinez* and presume reliance by a state court on a procedural default, where it appears unlikely that the court rested its affirmance on that ground."[136] This statement may be a warning to state appellate courts to clearly identify the bases of their holdings, or risk federal habeas review.[137] Indeed, the court cited with approval Judge Newman's concern about the *Martinez* rule:

> What concerns me about the majority's inference from state court silent affirmance is the prospect that in some future case where a procedural default is arguable, but not clear, the [state appellate court] will silently affirm after deciding that there was neither procedural default

ground for affirmance in the State's brief to the Appellate Division in order to block federal habeas review. However, the prosecutor's procedural argument may not be accurate. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 148 & n.6 (1979); Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983).

129. 758 F.2d 866 (2d Cir. 1985).

130. *See id.* at 872-73.

131. *See id.* at 870 & n.6. "The Queens County District Attorney seemingly conceded that the trial judge's actions amounted to a constitutional violation, but argued that such error was harmless." *Id.* at 870.

132. *See id.* at 870.

133. *See id.* at 871.

134. 650 F.2d 447 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

135. *See id.* at 451-52.

136. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985).

137. *See id.* at 872 & n.8 ("[w]e continue to urge the state courts to remove the ambiguity in their summary affirmances by indicating, with citation to [the state rules of criminal procedure] . . . . , their reliance on procedural default") (citation omitted).

> nor a valid claim on the merits, and we will then affirm the denial of habeas corpus relief because we mistakenly presume state court reliance on procedural default even though we think a constitutional error affecting substantial rights has occurred.[138]

In the past, the Supreme Court has attempted to solve the problem presented by unclear state opinions by searching the state court records—appellate and trial—to determine whether the state courts relied on a state procedural ground.[139] The major problem with this approach is that it is time-consuming[140] and therefore inefficient. This is a significant problem because one of the primary purposes of limiting habeas—relieving the burden on the lower federal courts[141]—is undermined by requiring federal habeas courts to search the trial and appellate records every time a state court fails to state clearly the basis of its holding.

138. *Id.* at 872 (quoting Edwards v. Jones, 750 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring)).

139. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 147 n.5, 152 (1979); Wainwright v. Sykes, 433 U.S. 72, 74-75, 85-86 (1977); Irvin v. Dowd, 359 U.S. 394, 402-04 (1959). Some circuits have also applied this method. *See, e.g.*, Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983); Hockenbury v. Sowders, 620 F.2d 111, 113 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

140. *See* Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

141. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring.); Friendly, *supra* note 43, at 143-51; *Federal Habeas Corpus Review*, *supra* note 3, at 863 & nn.68-69. It is correctly pointed out that *Sykes* may not effectively relieve the burden of the lower federal courts. *See id.* at 863 n.69. The *Sykes* rule may be an attempt by the Court to retain the supervisory role of the federal courts, while responding to the concerns expressed by Justice Jackson in *Brown*, 344 U.S. at 537-41 (Jackson, J., concurring). In that case he wrote:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions innundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. . . .
>
> It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would protect the writ against abuse. . . .
>
> . . . .
>
> . . . It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold him. If he fails, he may make the same plea over and over again.
>
> Since the Constitution and laws made pursuant to it are the supreme law and since the supremacy and uniformity of federal law are attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system. But federal interference with state administration of its criminal law should not be premature and should not occur where it is not needed.

Id. at 536-41 (footnotes omitted). However, when the petitioner's claim falls short of a miscarriage of justice and he cannot show good cause for his default, then his pleas, meritorious or frivolous, will not be heard. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Brown v. Allen, 344 U.S. 443, 541 (1953) (Jackson, J., concurring).

A second problem is that ad hoc federal determinations of the basis of state court decisions injure the policy of comity, a doctrine which requires predictable interaction[142] between state and federal courts. State courts should know how federal habeas courts will react to their decisions.[143] This is impossible if a case-by-case rule of interpretation is adopted.[144]

Finally, this approach is of limited use because it can lead to inaccurate results.[145] For example, if a state appellate court issues an affirmance without opinion,[146] it is impossible to determine which of several grounds asserted by the prosecution forms the basis of the appellate court's decision. Moreover, a search of the trial court record—always a time-consuming process—will be unavailing in many cases because trial courts often fail to address the issue either as a matter of procedure or on the merits.[147] Thus, the first state court to face the issue may be an appellate court or a state habeas court.[148] All of these reasons point to the inaccuracy inherent in this approach. Inaccurate results are intolerable when an individual's liberty is at stake.[149] In addition, such inaccuracies thwart the policy of comity[150] which the Burger Court has so zealously guarded.[151]

A third approach to the problem of unclear state holdings—one which avoids unduly burdening the federal courts—is for the federal habeas court to assume that the state appellate court relied on federal law whenever the basis of the state court's opinion is unclear.[152] This would pro-

142. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

143. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

144. *See id.*

145. *See* Michigan v. Long, 463 U.S. 1032, 1039-40 (1983); *see also* Irvin v. Dowd, 359 U.S. 394, 403 (1959) (lower federal courts erred in construing the state court opinion as resting on state grounds).

146. See *supra* note 117.

147. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 263 & n.19 (1973) (Powell, J., concurring); *see, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 74-75 (1977); Phillips v. Smith, 717 F.2d 44, 46 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981).

148. *See* Sumner v. Mata, 449 U.S. 539, 541-42 (1981) (state appellate court); Wainwright v. Sykes, 433 U.S. 72, 75 (1977) (state habeas appeal); Martinez v. Harris, 675 F.2d 51, 53-54 (2d Cir.) (state appellate court), *cert. denied*, 459 U.S. 849 (1982); Washington v. Harris, 650 F.2d 447, 450-51 (2d Cir. 1981) (state appellate court), *cert. denied*, 455 U.S. 951 (1982); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980) (state appellate court), *cert. denied*, 450 U.S. 933 (1981); Preston v. Maggio, 705 F.2d 113, 114-15 (5th Cir. 1983) (appeal to state appellate court from denial of state habeas petition).

149. *See* Townsend v. Sain, 372 U.S. 293, 312-13 (1963); *see also* 28 U.S.C. § 2254(d)(2), (3), (6), (8) (1982). One of the policies of *Sykes* is to promote accuracy of results at trial. See *supra* notes 96-97 and accompanying text. It would be ironic if the accuracy promoted by the *Sykes* limit on habeas review was then subverted by the application of *Sykes* by the federal habeas courts to murky state court determinations.

150. *See* Michigan v. Long, 463 U.S. 1032, 1039-41 (1983).

151. See *supra* notes 91-93 and accompanying text.

152. *See* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (assuming state court held on the merits); Williams v. Zahradnick, 632 F.2d 353, 359 & n.6, 360 (4th Cir. 1980)

tect the petitioner's right under *Brown v. Allen*[153] to federal review, while avoiding undue burden on the lower federal courts.[154] This approach would also produce consistent results by avoiding ad hoc interpretations of state court opinions.[155] Finally, this method is supported by the Supreme Court's decision in *Michigan v. Long*.[156]

In *Long*, the Court on direct review confronted the problem of determining the basis of a state court's holding.[157] One basis for the state court's holding could have been an adequate and independent state ground, but the other could have been federal.[158] The Supreme Court held that review is not barred unless the state court includes "a 'plain statement' that a decision rests upon adequate and independent state grounds."[159] This rule assumes that there are no adequate and independent state grounds "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."[160] *Long* held that when it is not clear that adequate and independent state grounds support the judgment, the Supreme Court on direct appeal will assume that none exist.[161] Federal habeas courts should assume the same.

Arguably, applying the plain statement rule to state court opinions in the context of habeas review would allow the prisoner to obtain habeas review any time he merely asserted a federal claim. This argument is unpersuasive because it ignores the fact that if a valid state procedural ground exists and the state court's opinion clearly rests on that ground, the petitioner cannot secure habeas review by asserting a federal issue.[162] Requiring state courts to make a plain statement is a slight burden considering the prisoner's interest in securing federal habeas review.[163] A plain statement may be cursory; it does not require an in-depth written analysis.[164] Thus, the compromise of the state interest is slight in comparison to the total compromise of the prisoner's rights if another rule were adopted.[165]

(same); L. Yackle, *supra* note 3, § 84, at 142-43 (Cum. Supp. 1985) (federal habeas court should assume state court held on merits).

153. 344 U.S. 443 (1953).

154. See *supra* notes 140-41, *infra* notes 163-65 and accompanying text.

155. L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). See *supra* note 121 and accompanying text.

156. 463 U.S. 1032 (1983).

157. *See id.* at 1037.

158. *See id.* The state court could have held on either state constitutional grounds or federal constitutional grounds on the issue of whether a search of defendant's car was illegal. *Id.* at 1043-44.

159. *Id.* at 1042.

160. *Id.* (footnote omitted).

161. *See id.*

162. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). See *supra* notes 33-51, 58-116 and accompanying text.

163. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (exhaustion requirement is satisfied if petitioner raises the claim in state court, regardless of whether the state court passes on it).

164. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983); L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* County Court v. Allen, 442 U.S. 140, 153-54 (1979) (state court passed on merits of federal constitutional claim, despite brevity of its discussion of that issue); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.) (assuming procedural ground when no reasoning given), *cert. denied*, 459 U.S. 849 (1982).

Moreover, the state court is the controlling actor in this scenario. It has complete control over the content of its opinion,[166] and the content determines whether the *Sykes* cause and prejudice standard applies.[167] Therefore, the state court, by drafting an opinion with a plain statement, can determine whether federal habeas review will be freely given; the prisoner does not have that control. If the state court does not clearly indicate the basis for its holding, the doubt should be resolved against the state—the controlling actor—and *Sykes* should not apply.[168]

Finally, applying *Long*'s plain statement rule to habeas review does not unduly offend the systemic policies of *Sykes*. Under the plain statement rule the policies of finality and efficiency would be harmed only when the basis of the state court's opinion is ambiguous.[169] When a state court clearly indicates that its decision is based on adequate and independent state grounds, federal review would be unavailable absent a demonstra-

165. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

166. *See id.*

167. If the rationale is solely federal, then *Sykes* does not apply. See *supra* notes 52-57 and accompanying text. If the decision is based alternatively on federal and state grounds, *Sykes* should apply, though some circuits do not apply *Sykes* in this case. See *supra* notes 15-17, 58-116 and accompanying text. If the state ground is the sole basis, then *Sykes* applies. See *supra* notes 33-51 and accompanying text.

168. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (direct review of state court conviction). The Supreme Court in the context of direct review has stated:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. . . . For no other course assures that important federal issues . . . will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states.

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). In *National Tea* the Supreme Court vacated a state court judgment and remanded for a clarification of the basis of that court's decision. *See id.* at 556-57. A federal habeas court should not, however, employ that procedure. Vacating every state conviction in which the state court's reasoning was not clear would be contrary to the policy of comity. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting). The problem is more easily solved by requiring a plain statement.

169. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

tion of cause and prejudice.[170] Further, to avoid federal habeas review, a state court need only briefly state in its opinion the adequate and independent state grounds.[171] Although it can be argued that placing requirements on the drafting of state courts' opinions offends comity, in these circumstances the offense is minimal. In the case of an unclear holding, the state court is asked to say more. It is not constrained from discussing federal law. Thus, applying *Long* to unclear holdings would not offend comity to the same extent that not applying *Sykes* to alternative holdings would.[172]

In *Long*, the Supreme Court discussed the effect of the plain statement rule on comity. First, the Court emphasized the problems presented when a reviewing court determines ad hoc whether a decision was based on adequate and independent state grounds.[173] The Court viewed that method as "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[174] The Court then stated that the plain statement approach "provide[s] state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. . . . '[It is important] that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by [the Supreme Court] of the validity under the federal constitution of state action.' "[175] Thus the Court indicated that the plain statement rule might actually promote rather than offend comity.

Because the alternatives to applying the plain statement rule to habeas corpus review are to accept ad hoc determinations by reviewing courts[176] or to assume that the claim is procedurally barred,[177] any injury to comity arising from applying *Long* to unclear state holdings is tolerable.[178] Although more friction may arise from applying *Long* in the habeas context than on direct review, this merely reflects the fact that habeas review by its very nature creates friction between federal and state courts.[179] Further, applying *Long* to unclear holdings furthers *Brown v. Allen*'s protection of state prisoners against violations of their federal rights by the states.[180] Finally, although applying *Long* to habeas review may compromise comity slightly, it also furthers comity since it is a consistent and predictable approach.

170. See *supra* note 24 and accompanying text; *cf. Long*, 463 U.S. at 1043-44 (rule applied in context of direct review).

171. See *supra* note 164 and accompanying text.

172. See *supra* notes 142-44 and accompanying text.

173. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

174. *Id.*

175. *Id.* at 1041 (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

176. See *supra* notes 139-51 and accompanying text.

177. See *supra* notes 120-28 and accompanying text.

178. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

179. *See* Engle v. Isaac, 456 U.S. 107, 128 & n.33 (1982); Sumner v. Mata, 449 U.S. 539, 550 (1981); Norris v. United States, 687 F.2d 899, 901 (7th Cir. 1982); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261, at 600 (1978).

180. See *supra* notes 122-27 and accompanying text.

CONCLUSION

The *Sykes* cause and prejudice standard should be applied whenever a state court, solely or alternatively, relies on a procedural ground that constitutes an adequate and independent state ground. If the state court does not rely on a state ground, free habeas review as guaranteed by *Brown v. Allen* should be granted. When the basis of the state conviction is unclear, the federal court should apply the plain statement rule established by the Court in *Michigan v. Long*. When it is not clear that adequate and independent state grounds support the conviction, the federal habeas court should assume none exist and therefore grant habeas review.

These rules further the systemic policies enunciated by the Court in *Sykes*. Although applying *Long* to habeas review might slightly increase federal-state friction, this is tolerable. If *Long* is not applied to unclear holdings, the alternatives are to accept ad hoc determinations by reviewing courts, which can lead to even greater friction between the two court systems, or risk sacrificing the state prisoner's right to federal adjudication of his federal claim even though that claim is not barred by an adequate and independent state procedural ground.

James W. Dobbins

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

December 30, 1987

AREA CODE 202
479-3011

Jack Donatelli, Esquire
Assistant Attorney General
of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Re: 87-5677 - Warren Lee Harris v. Marvin Reed, Warden, et al.

Dear Mr. Donatelli:

On October 16, 1987, a petition for a writ of certiorari in the above case was filed in this Court to review an order of the United States Court of Appeals for the Seventh Circuit (No. 86-2032), dated June 12, 1987. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Ten typewritten or otherwise reproduced copies of your response, together with proof of service thereof, should reach this office on or before January 29, 1988.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

Enclosure

cc: Kimball R. Anderson, Esquire

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,
Petitioner,

v.

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 16, 1987
CERTIORARI GRANTED MARCH 7, 1988

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Item
December 15, 1977	Trial of Warren Lee Harris begins
December 21, 1977	Defense rests without presenting any witnesses, jury convicts Harris of murder
February 2, 1978	Harris sentenced to 50 to 100 years in prison
June 4, 1979	Illinois Appellate Court affirms Harris' conviction on direct appeal
July 17, 1979	Harris files petition for post-conviction relief in Circuit Court of Cook County, Illinois
January 31, 1980	Harris files *pro se* petition for habeas corpus in the United States District Court for the Northern District of Illinois, No. 80 C 531
March 19, 1981	Harris' motion for post-conviction relief in the Circuit Court of Cook County is denied
October 4, 1982	Federal district court adopts magistrate's recommendation that petition be dismissed for failure to exhaust state remedies
February 22, 1983	Illinois Appellate Court affirms the denial of Harris' post-conviction relief
April 3, 1983	Federal district court reinstates Harris' petition for habeas corpus now that Illinois Appellate Court has affirmed denial of post-conviction relief and allows Harris to file amended petition for habeas corpus

Date	Item
April 11, 1983	Harris files *pro se* amended petition for habeas corpus
April 8, 1985	Federal district court grants respondent's motion for summary judgment, except as to ineffective assistance of counsel claim, and appoints counsel to represent Harris on this issue
November 4, 14 and 26, 1985	Federal district court conducts trial on merits of ineffective assistance claim
May 30, 1986	Federal district court issues findings of fact and conclusions of law and denies petition; issues certificate of probable cause for appeal
June 17, 1986	Notice of appeal filed for appeal to the United States Court of Appeals for the Seventh Circuit
June 12, 1987	Seventh Circuit affirms district court decision
July 20, 1987	Seventh Circuit denies petition for rehearing *en banc*
October 16, 1987	Petition for Certiorari to the Seventh Circuit filed with the United States Supreme Court
March 7, 1988	United States Supreme Court grants Petition For Certiorari as to Question 1 presented by the Petition.

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

Indictment No. 77-4796

Charge: Murder

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

WARREN HARRIS

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on Thursday, the 15th day of December, A.D. 1977, this clause came on for trial before the Honorable LOUIS B. GARIPPO, Judge of said court, and a jury, upon the indictment herein, the defendant having entered a plea of not guilty.

* * * *

December 19, 1977

We believe the evidence will also show that the police learned two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come into the

Area Four Police Headquarters, advised him of his rights and interrogated him.

At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.

The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that he had gone into that neighborhood to purchase narcotics, that he was across the street at the time of the shooting but that he didn't see the shooting itself.

At this point Melvin McWhorter is a chief suspect in the focus of the police investigation, and it is at this point, and some six weeks after the shooting, that the name Antonio Slater appears before the police. This is a man who, mind you, has never come forward to the police in six weeks after the shooting, it is also a person who none of the people interviewed by the police at the scene had named to the police as one of the men who had been in that area and who possibly had witnessed the shooting.

Antonio Slater gives his statement to the police and at that point the focus of the investigation shifts away from Melvin McWhorter.

* * * *

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

78-1193

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
WARREN HARRIS,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
Honorable Louis B. Garippo Judge Presiding

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a jury trial defendant, Warren Harris, was convicted of murder and sentenced to the penitentiary for a term of 50 to 100 years. (Ill. Rev. Stat. 1977, ch. 38, par. 9-1.) On appeal he contends that he was not proved guilty beyond a reasonable doubt.

The deceased Earnest Howard was fatally shot about 10 p.m. on July 9, 1977, in the 1500 block of South Christiana Avenue on the West Side of Chicago. The chief prosecution witness was Antonio Slater.

Slater testified that he was driving on Christiana that evening when he had to stop a short distance behind a Buick automobile which was parked in such a way as to block the street. Slater heard a gunshot and saw 2 men

on the sidewalk in front of the Buick. The man who was facing this witness began to fall and the other man pushed him away, turned and then ran back to the Buick. As this man reached the passenger door, the beam of one of Slater's headlights shone on him about the waist and the street lights were illuminating the area. The man, whom Slater recognized as defendant, drew a gun and pointed it at him causing Slater to crouch down in his car. Defendant then entered the Buick, and it was driven away. Slater also drove off but did not report his presence at the scene to police for 6 weeks. Slater indicated that he knew defendant because he had seen him several times in a pool hall prior to the shooting and did not have any trouble seeing his face at the time of the shooting.

On cross-examination defense counsel sought to discredit Slater by reference to his signed statement given to police and his testimony at a preliminary hearing. Slater testified that he had driven a friend to the area of the shooting while the written statement indicated that he was on the way to the friend's house. It was also established that Slater's written statement showed the car defendant entered drove past Slater's car when leaving the scene of the shooting, while his trial testimony established defendant's car was driven away from Slater. Defense counsel also elicited that at the preliminary hearing Slater testified that his car was pulling up behind the Buick when defendant pointed the gun at him, but at trial Slater said that his car was stopped when this occurred.

Defense counsel also elicited variations in Slater's trial testimony when Slater first said the incident lasted only several seconds and then modified the length of the occurrence to several minutes. Also it was shown that Slater drove away as people gathered about the scene, although another witness, who discovered deceased shortly

after the shooting, saw no one in the area. Further the record indicates that Slater could not recall precisely when he had previously seen defendant.

Defendant now argues that the aforesaid inconsistencies in Slater's testimony and the circumstances, which permit only a weak identification, do not establish his guilt beyond a reasonable doubt. In considering defendant's contention we apply the well established rules that the identification of the defendant by one credible eyewitness, who views defendant under circumstances allowing an identification, is sufficient to sustain a conviction (*People v. Yarbrough* (1977), 67 Ill. 2d 222, 226, 367 N.E.2d 666); and the determination of defendant's guilt by the jury will not be set aside unless the evidence is so improbable as to raise a reasonable doubt of guilt (*People v. McDonald* (1975), 62 Ill. 2d 448, 456, 343 N.E.2d 489).

Applying these principles to the facts presented we discern no basis to disturb the jury's determination. The fact the beam of one headlight projected at defendant's waist and the area was illuminated by street lights would give Slater an opportunity to see defendant from the apparent short distance which separated them. There is nothing to detract from Slater's statement that he could see defendant's face. Moreover, Slater's prior familiarity with defendant would strengthen the identification (*People v. Watkins* (1976), 44 Ill. App. 3d 73, 77, 357 N.E.2d 1376; *People v. Farrar* (1972), 7 Ill. App. 3d 312, 314, 287 N.E.2d 475) thereby lessening the import of defendant's reference to the length of time Slater saw the assailant. The inconsistencies, which defendant notes between Slater's trial testimony and his version given at a preliminary hearing and recited in a written statement, are minor and not unusual; they do not destroy credibility but go only to the weight of his testimony. (*People v. Bell* (1972), 52 Ill. 2d 122, 125-126, 290 N.E.2d 214.) After review of the record, we

do not believe that Slater's testimony was improbable or that a reasonable doubt of guilt exists.

The appeal presents no issue of precedential importance and an opinion is unnecessary. We therefore dispose of the matter pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1977, ch. 110A, par. 23); the judgment of the circuit court is affirmed.

Dated at Chicago, Illinois, this 4th day of June, 1979.

ENTER:

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

(Title Omitted in Printing)

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Defendant, Warren Harris, appeals from an order granting the State's motion to dismiss his petition for post-conviction relief, contending that he was improperly denied an evidentiary hearing.

The record shows that defendant was tried before a jury, convicted of murder, and then sentenced to serve 50 to 100 years in the penitentiary. That judgment was affirmed on direct appeal pursuant to Supreme Court Rule 23. *Peope v. Harris* (1979), 71 Ill. App. 3d 1113.

The facts set forth in the order affirming his conviction reveal that defendant fatally shot Earnest Howard about 10 p.m. on July 9, 1977. The chief prosecution witness was Antonio Slater who testified that he was driving on Christiana Avenue in Chicago that evening when a parked car blocked his path. He heard a gunshot and saw two men standing on the sidewalk in front of the parked car. The man facing Slater began to fall and defendant pushed him away, turned and ran back to the car. As he reached the passenger door, the beam of one of Slater's headlights shone on defendant above the waist. Defendant then drew a gun and pointed it at Slater, causing Slater to crouch down in his car. Defendant entered the parked car and was driven away. Slater also drove off but did not report his presence to the police for about six weeks. He indicated that he knew defend-

ant because he had seen him several times in a pool hall and was able to see his face after the shooting.

At trial, defendant was represented by an assistant public defender. During cross-examination of Slater, he attempted to impeach Slater by showing the discrepancies between his signed statement and his testimony at a preliminary hearing, by showing inconsistencies in his trial testimony, and raising questions about where he had previously seen the defendant.

In his direct appeal defendant was represented by the office of the State Appellate Defender, and the sole issue presented for review was whether defendant had been proved guilty beyond a reasonable doubt. When this issue was resolved against him, defendant filed a *pro se* petition for post-conviction relief. (Ill. Rev. Stat. 1979, ch. 38, pars. 122-1 *et seq.*) Private counsel was appointed to represent him on the petition and an amended petition was prepared and filed.

In that petition defendant alleged that he was denied his right to the effective assistance of counsel in that his trial counsel failed to properly prepare for trial because he did not interview or call two witnesses who saw two men running from the scene; Melvin McWhorter was identified as one of these men. Defendant also alleged that his trial counsel failed to call George Williams as a witness to testify that he was the man with McWhorter on the night of the shooting; that counsel failed to seek disclosure of the identity of the informant who provided police with the name of the State's only identification witness five weeks after the shooting; that counsel failed to call a rebuttal witness to impeach Slater's testimony that he voluntarily went to the police; that counsel failed to offer into evidence a stipulation that would have perfected the impeachment of Slater on the issue of his turning onto Christiana from 16th Street; that counsel failed to investigate and seriously consider defendant's potentially viable alibi defense, or contact alibi witnesses; and that counsel failed to inform defendant that no evidence or alibi would be offered in his defense until the morning on which the defense was to go forward and then ignored defendant's objection to this procedure.

Attached to the petition was the affidavit of Melvin McWhorter who stated that he was acquainted with the deceased and bought narcotics from him and that he was present when he was shot by George Williams. He also averred that he is acquainted with Slater, whom he knew to be a drug addict, and that he was not present in the area on the night deceased was killed.

The affidavits of Jewel, Mary and Genise Conner, friends of the defendant, were also attached in which they averred that defendant was sick in bed on the day of the shooting in the home of Jewel Conner. Jewel also stated that she notified defense counsel of this potential alibi defense and that she was available as a witness but was never contacted.

The defendant also attached the answer to discovery filed by his trial attorney and various police reports which were also filed in conjunction with the incident. These reflected interviews with two persons who identified McWhorter as one of two men seen fleeing from the incident, an interview with McWhorter in which he denied any knowledge of the shooting, and an interview with Williams.

The State filed a motion to dismiss alleging, *inter alia*, that the doctrines of *res judicata* and waiver were applicable in light of the affirmance of the judgment on direct appeal. The defendant's petition was dismissed without an evidentiary hearing and this appeal followed. Defendant now maintains that an evidentiary hearing should have been held to determine the merits of his allegation of incompetence of counsel or, in the alternative, that the State should have been required to file an answer.

The State initially responds that defendant has waived his right to assert a claim of the incompetence of his trial counsel because he failed to raise this issue in his direct appeal.

It is well settled that where a direct appeal is taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those which could have been presented, but were not, are considered waived. (*People v. French* (1970), 46 Ill. 2d 104, 262 N.E.2d 901.) Where, however, the allegations in a post-conviction petition are based on facts which do not appear in the record, they are not barred by the doctrine of *res judicata*. *People v. Edmonds* (1979), 79 Ill. App. 3d 33, 398 N.E.2d 230.

In the instant case, defendant alleges incompetence because his trial counsel failed to investigate or call several witnesses on his behalf, to perfect impeachment of the State's chief witness, or to investigate and present an alibi defense. Our examination of the record in this appeal indicates that, except for the alibi witnesses, the identity of the persons set forth by the defendant and their statements to the police were of record, and it also appears that the stipulation alluded to by defendants was contained in the trial record. As such, these matters could have been raised in defendant's direct appeal. (See *People v. Churchill* (1981), 92 Ill. App. 3d 1006, 416 N.E.2d 395.) In this regard we find it noteworthy that defendant's appellate counsel was not affiliated in any way with his trial counsel, and there is also no indication that defendant expressed any dissatisfaction with his trial counsel at the time the appeal was filed or raised any question regarding the competency of his trial counsel. See *People v. Stewart* (1978), 66 Ill. App. 3d 342, 383 N.E.2d 1179.

Competency is determined from the totality of counsel's conduct at trial. (*People v. Murphy* (1978), 72 Ill.

2d 421, 381 N.E.2d 677.) In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney, and that this incompetence produced substantial prejudice to him without which the result of the trial would probably have been different. *People v. Talley* (1981), 97 Ill. App. 3d 439, 422 N.E.2d 1084.

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present the alibi witnesses and to present an alibi defense. The affidavits show that the Conners made themselves available to defense counsel but were never called as witnesses to testify as to defendant's whereabouts at the time of the shooting.

The determination of whether or not to call a witness is generally regarded as a matter of trial strategy, and, even if it were error on the part of trial counsel not to introduce this testimony, errors in strategy and judgment on the part of counsel do not render the representation incompetent. *People v. Pendleton* (1982), 104 Ill. App. 3d 1104, 433 N.E.2d 1076, and cases cited therein.

It appears on this record that counsel's strategy was to rely on the State's inability to prove the defendant guilty beyond a reasonable doubt as indicated in his answer to discovery. The facts gleaned from the order affirming defendant's conviction indicate that counsel decided to emphasize the discrepancies in the testimony of the State's only eyewitness. To this end he vigorously cross-examined Slater in an attempt to impeach his testimony and point out the inconsistencies in his statements. The fact that an attorney in the better light of hindsight might have handled the trial in a different manner is not an indication of trial counsel's incompetence. *People v. Elder* (1979), 73 Ill. App. 3d 192, 391 N.E.2d 403; see also

People v. Martinez (1982), 104 Ill. App. 3d 990, 433 N.E.2d 981.

Before an evidentiary hearing is required in a post-conviction proceeding, a petitioner must make a substantial showing of a violation of a constitutional right (*People v. Farnsley* (1973), 53 Ill. 2d 537, 293 N.E.2d 600), and a reviewing court will not reverse the determination of the trial court in that regard unless it was manifestly erroneous (*People v. Murphy* (1979), 78 Ill. App. 3d 132, 397 N.E.2d 68).

Viewing defendant's petition and supporting affidavits in light of the record, we do not believe that he has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court.

Dated at Chicago, Illinois, this 22nd day of February, 1983.

BUCKLEY, P.J., McGLOON and GOLDBERG, J.J.

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 80 C 513

UNITED STATES OF AMERICA, *ex rel.*
WARREN LEE HARRIS,
Petitioner,

v.

MARVIN REED,
Respondent.

April 8, 1985

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This action is before the court on the petition for a writ of habeas corpus, 28 U.S.C. § 2254, of Warren Lee Harris. The parties have briefed respondent's motion for summary judgment. Moreover, the parties have provided the court with additional materials from the state court record. For the reasons stated below, respondent's motion for summary judgment is granted in part and denied in part. An evidentiary hearing is required to determine the merits of the one outstanding claim. The court therefore will appoint an attorney to aid Harris in this evidentiary hearing.

Factual Discussion

On December 21, 1977, after a three-day jury trial, Harris was found guilty of murder on the testimony of

the state's one occurrence witness, Antonio Slater. According to Slater, Harris shot and killed one Earnest Howard on the night of July 9, 1977, near the area of 16th and Christiana streets in Chicago, Illinois. On February 2, 1987, Harris was sentenced to serve 50 to 100 years in the state penitentiary.

At trial, Public Defenders Todd Musberger and Kathy Kuhlen represented Harris. In her opening statement on December 19, 1977, Kuhlen made the following remarks:

> At this time, I would like to mention one of the names that Mr. Fuenty [prosecutor] brought up and also another name that he didn't mention that I think will figure quite prominently in this trial, that other name is Melvin McWhorter, also known as Buster on the street.
>
> To understand the importance of Mr. McWhorter and of Antonio Slater, it is necessary to give you a brief review of the police investigation in this case. During the days immediately following the shooting of Earnest Howard the police talked to a number of people who were present in the area of 16th and Christiana, people who lived there and also to relatives of Earnest Howard. They learned that Earnest Howard was a narcotics dealer who sold in that neighborhood at 16th and Christiana.
>
> * * * *
>
> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.

> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that . . . he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Trial Transcript 31-33.) Kuhlen continued, discussing how Slater's statement to the police switched the focus of suspicion to Harris from McWhorter, and asking the jury to examine carefully Slater's credibility.

The state first called Howard's father to testify that he identified his son's body at the morgue. This was not objected to, although the identity of the victim was not in dispute. Harris does not claim error from this failure.

The state next called Maurice Williams, who knew the victim as "Pete." Williams came to Pete's aid soon after the shooting by calling the police. Williams testified that he noticed McWhorter (Buster) among the crowd of persons that had gathered around the scene of the shooting. (Tr. 46, 51.)

On December 20, 1977, the state examined Officer Joseph Michello, one of the police officers that appeared on the scene after the shooting. Musberger's cross-examination centered on the location of Howard's body upon his arrival on the scene.

The state next called Antonio Slater, who explained on direct examination that he arrived at the scene of the shooting while driving south on Christiana (a one-way southbound street) at about 20 m.p.h. Slater testified that he crossed the intersection of 15th and Christiana and when he was about 12 feet behind a parked vehicle

that was blocking his way, he heard a shot and noticed two men standing near each other. He witnessed the man with his back to Slater push the other man, who fell. This occurred about 12 feet in front, or south, of the car that was parked in front of Slater's. The man who had pushed the other man down, turned and ran to the parked car, turned and faced Slater, pulled up a pistol at Slater, and jumped into the passenger section of the car. (R. 71-76.) When the pistol was pointed at him, Slater crouched. (R. 79.) The car pulled away. (R.76.)

When asked to identify the man who apparently shot Howard, Slater responded, "Wayne" and in court identified Harris as Wayne. (R. 77-78.) Slater testified that he knew Wayne from a poolroom at 13th and Kedzie. He testified:

> I don't actually know [Harris], I know him by people speaking to him, you know, but about two years I have seen him up there . . . . about once or twice a month.

(R. 78.) Slater was able to see Wayne because gold street lights along Christiana were lit and because his headlights were shining on Wayne's waist. (R. 81.)

Slater was next asked about going to the police station. He testified that he went there in August 1977 with his uncle and talked to Investigator Tom Shine. Slater testified that he had not been contacted before he went to the station. (R. 84.)

Musberger then cross-examined Slater. He first pointed out that it took Slater six weeks to go to the police with his story. (R. 89.) He highlighted that Slater had changed his reason for having been in the area of 15th and Christiana on that night. Musberger also highlighted inconsistencies between Slater's pretrial statements and his trial testimony. Musberger also impeached Slater's story that he had seen Wayne several times over the previous two years. (R. 109-110.)

After Slater, two other witnesses were called by the prosecution on the issue of the cause of death. On December 21, 1977, the defense rested without putting on any evidence. (R. 130.) The portions of the opening argument suggesting that McWhorter or others might have been responsible for the shooting were ignored completely. Later that afternoon, the jury returned a verdict that Harris was guilty of murder.

After sentencing, Harris was represented by an Assistant Defender, Nancy Abrahams, on direct appeal. Abrahams presented one argument on appeal, namely, that the evidence was insufficient constitutionally to support a conviction for murder. (Respondent's Attachment, filed 2/15/85, Brief for Appellant.) On June 4, 1979, the Appellate Court found the evidence constitutionally sufficient and affirmed the conviction. (*Id.* at Order Disposing of Appeal under Supreme Court Rule 23 [direct appeal]).

On July 17, 1979, Abrahams, as Harris's stand-by counsel, filed Harris's pro se petition for post-conviction relief. (Harris's Motion in Opposition, filed 11/21/83, at 8-9.) In the post-conviction petition, Harris raised two issues: (1) ineffective assistance of trial counsel, and (2) newly discovered evidence. The public defender's office was granted leave to withdraw, and Attorney Loretta Hall Hardiman assumed prosecution of the petition. She filed an amended post-conviction petition, dropping the newly discovered evidence claim.

The lower post-conviction court held a hearing on March 27, 1980. A second hearing on the amended petition occurred on March 19, 1981. (The transcript is attached as Exhibit 3 to Harris's Motion to Reconsider, filed 10/18/82.) The court denied the petition at the close of that hearing, without convening a hearing in which to take testimony. *Id.* at 27. Assistant Appellate Defender Bruce Mosbacher represented Harris on appeal

of this decision. The denial of post-conviction relief was affirmed on February 22, 1983. (Respondent's Answer and Memorandum, filed 10/21/83, Order Disposing of Appeal Under Supreme Court Rule 23 [post-conviction].)

Claims for Relief

Harris first claims that he was unduly prejudiced by the state court delay in disposing of his post-conviction petition. According to Harris, certain alibi witnesses (the Connor family) moved to Mississippi in late 1979 and Z. Mary Connor died in December 1979. (Original Petition, attachment, at 1-2.) This loss of evidence, caused by the alleged inexplicable delay, is offered as support for the claim that Harris is now in custody in violation of the federal constitution.

Harris' second claim for relief is based on alleged ineffective assistance of counsel. According to Harris, his trial counsel failed properly to investigate witnesses and to impeach the testimony of Antonio Slater. Harris listed several errors in his amended petition for habeas corpus, all of which were raised in his amended petition for post-conviction relief:

> 1. Counsel failed to interview or call as witnesses Investigators B. Peck and L. Sykes to impeach Slater. These witnesses would testify that "the victim was shot in the gangway," although Slater testified the victim was shot on Christiana street. (Amended Petition for Habeas Corpus Item H.)
>
> 2. Counsel failed to interview or call as witnesses Alice Riles or Leroy Carter. Both saw two men running from the scene of the shooting at the time of the shooting. Both identified McWhorter as one of the two men. Riles indicated in the police report that she could identify the other man by appearance. Police records contained this information.

> 3. Counsel failed to investigate or call as a witness George Williams. Williams would testify that he was with McWhorter the night of the shooting, that he knew the victim through a long history of drug dealings, and that Harris was not at the scene of the shooting. Police records contained this information.
>
> 4. Counsel failed to call police investigator Shine or any other investigator to impeach Slater's testimony that he did not hang out in the area of the shooting and that he had never been in that area. Shine also could have impeached Slater's statement that he came to the police station voluntarily, although Shine's report indicates an informant provided Slater's name and the police contacted Slater. Counsel also did not seek the identity of the informant.
>
> 5. Counsel failed to offer into evidence the agreed stipulation that "would have perfected the impeachment of the witness Slater [sic] trial testimony that he turned off Christiana from 16th Street and witness [sic] the crime." (*Id.* at Item O.)
>
> 6. Counsel failed to call or investigate residents of 13th and Kedzie, who could testify that no pool room existed at that corner, thereby impeaching Slater's testimony that he knew Harris as Wayne from "seeing him every month at a poolroom on 13th and Kedzie." (*Id.* at Item Q.)
>
> 7. Counsel failed to interview, investigate, or call as witnesses four alibi witnesses: Jewel Connor, Z. Mary Connor, Genise Connor, and Charles Thomas. Harris provided counsel with the names and addresses of the witnesses. These witnesses would have testified that Harris was ill and in bed at the Connor's home on the night of July 9, 1977 and was later hospitalized on July 13, 1977 for that same

illness. (See Affidavits attached to original petition for habeas corpus.)

8. Counsel failed to call any of the doctors who treated Harris at Cook County Hospital to testify and corroborate his alibi witnesses' story that he was hospitalized on July 13, 1977 with an illness that would indicate he was also ill on July 9, 1977.

All of the names contained in this list of alleged errors, except the names of the alibi witnesses, are contained in the police records and in the state's list of potential witnesses. (See Harris's Requested Records and Information, filed 2/25/85 [Answer to Discovery].) According to Harris's amended post-conviction petition, he did not learn that counsel would present no defense evidence until December 21, 1977, the last day of trial. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 1 at p. 3 [Amended Petition for Post-Conviction Relief].)

Harris's third contention is that his detention is unconstitutional because newly discovered evidence establishes his innocence. This evidence is an affidavit executed by Melvin McWhorter, who would testify that Slater was not present at the scene of the shooting and that he witnessed George Williams shoot the victim. Harris notes that Riles, Carter, and Williams corroborate some of these facts, including that Williams and McWhorter were together that night and that McWhorter was seen leaving the scene of the shooting. (The court notes that, accepting as true Harris's counsel's opening statements, this would be McWhorter's third story. The first was that he knew nothing about the shooting; the second, that he was across the street from the shooting but saw nothing; and the third, that he saw Williams shoot Howard.)

Harris's final claim is that the evidence was constitutionally insufficient to convict him of murder beyond a

reasonable doubt. He claims Slater's testimony was so inconsistent as to be incredible.

Legal Discussion

I. Post-Conviction Delay

Harris's first claim for relief stems from alleged prejudicial delay in the disposition of his Illinois petition for post-conviction relief. This claim was raised in Harris's original habeas corpus petition, which was received by the Clerk of the United States District Court on January 31, 1980 and filed on February 8, 1980. Harris had previously filed, on July 17, 1979, a petition for post-conviction relief. (Stand-by counsel Abrahams' affidavit evidences that she filed the petition on that date. *See* Abrahams Aff., attached to original petition for habeas corpus.)

Starting in early 1980, therefore, Harris had proceedings concerning the validity of his conviction pending simultaneously in both federal and state court. While District Judge Joel Flaum considered various issues regarding Harris's petition (basically mootness and exhaustion), Harris attempted to get his claims resolved in state court as well. The post-conviction petition was denied by the lower state court on March 21, 1981. On October 4, 1982, the federal district court dismissed Harris's petition for failure to exhaust available state remedies, because Harris at that time had an appeal of the post-conviction decision pending in the Illinois Appellate Court. On April 4, 1983, Judge Flaum granted Harris's motion to reinstate his action and file an amended petition for habeas corpus, as exhaustion had been accomplished by that date.

Harris complains that his petition for post-conviction relief was "in limbo" for 7½ months before any action thereon was taken by the Illinois courts. Since one of his four alibi witnesses died in late December 1979 and all had moved to Mississippi by the end of 1979, Harris

contends that the delay in processing his post-conviction petition was unconstitutionally prejudicial.

To the extent that Harris's claim based on post-conviction delay sought relief from the exhaustion requirement in habeas cases, that claim is clearly moot. Inordinate delays in state procedures, such as post-trial motions, appeals, and post-conviction remedies, may exclude exhaustion in circuits where exhaustion is not considered a jurisdictional requirement. *See McGee v. Estelle*, 722 F.2d 1206, 1209-11 (5th Cir. 1984); *Baldwin v. Lewis*, 442 F.2d 29, 32-33 (7th Cir.1971). The remedy for inordinate delay is normally immediate consideration by the federal court of petitioner's federal claims, an effective waiver of the exhaustion requirement. *See Dixon v. State of Florida*, 388 F.2d 424, 426 (5th Cir. 1968); *Rheuark v. Wade*, 540 F.2d 1282, 1283 (5th Cir. 1976) (direct appeal); *cf. United States ex rel. Smith v. Twomey*, 486 F.2d 736, 738-39 (7th Cir.1973), *cert. denied*, 416 U.S. 994, 94 S.Ct. 2408, 40 L.Ed.2d 773, *reh'g denied*, 417 U.S. 959, 94 S.Ct. 3089, 41 L.Ed.2d 677 (1974). However, because Harris has exhausted his state appellate and post-conviction remedies, such a claim would now be moot.

Harris may also be arguing that the Illinois delay effectively deprived him of the right to present his constitutional claims in a federal forum, as evidence was lost during the delay. Harris is thus not attacking the adequacy of Illinois post-conviction procedures per se—an attack that would probably not rise to a constitutional violation, *see Williams v. State of Missouri*, 640 F.2d 140, 143-44 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981)—but the effect of Illinois post-conviction procedures on the federal right of habeas corpus. At least one court has hinted that an inordinate delay, in that case twelve years, may violate petitioner's rights, even absent any trial error. *Codispoti v. Howard*, 589 F.2d 135, 142 (3d Cir. 1978).

Assuming that the Illinois delay in disposing of Harris's post-conviction petition was inordinate and could violate his right to a full and fair consideration of his federal habeas claims in federal court, however, Harris's claim appears to be without merit. The death of one of four alibi witnesses, Z. Mary Connor, alone is not prejudicial, since her testimony would be cumulative (all were in the same dwelling with Harris on the night of the shooting; three, including the deceased witness, executed affidavits to that fact). Moreover, while the witnesses now live out of state, Harris does not claim that they are inaccessible should their testimony be needed. On the present record, therefore, Harris has suffered no prejudice from the delay.

The court doubts that post-conviction delays, absent a showing of prejudice, alone could justify release of a petitioner for federal habeas corpus relief. Even if such a delay by itself could be reason for release, however, the delay in this case could not have violated Harris's federal due process rights. This delay appears to have been the result of misplacement of Harris's post-conviction petition. Moreover, cases examining delays in state procedures involve time periods far in excess of seven months. The 7½ month delay in this case is not so egregious that, absent prejudice, it could justify issuance of the writ for violation of Harris's federal due process rights.

Respondent's motion for summary judgment is granted as to Harris's claim of post-conviction delay.

II. Ineffective Assistance of Counsel

A. Waiver

As was discussed above, the one issue presented on direct appeal by Assistant Appellate Defender Nancy Abrahams was the lack of sufficient evidence on which to convict. The court's own examination of Harris's and

the state's legal memorandum on direct appeal confirms this fact. Moreover, the Illinois Appellate Court's opinion on direct appeal addressed only the sufficiency of the evidence. and not the other issues raised by Harris in his petition for federal collateral review.

The original and amended post-conviction petitions raised the issue of ineffective assistance of trial counsel. The court is provided with the transcript of the March 19, 1981 lower court post-conviction hearing. The transcript reveals that Harris' attorney Hardiman and the state vigorously disputed the merits of the ineffective assistance of counsel claim. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 6-27 [Transcript].) However, the parties also discussed the possibility that Harris waived his right to raise the issue through failure to preserve it on direct appeal. (*Id.* at 3-4, 7.) Moreover, the hearing court was aware of the waiver issue, as demonstrated by this comment:

> My question as a judge in this case is to determine whether or not, as a result of the trial that was had, the defendant had a fair trial, . . . and if not, any matters that were improperly handled, those matters should have been raised on the basis of an appeal [sic].

(Id. at 26.) In any case, the hearing court also appeared to reach the merits of the ineffective assistance claim:

> On the basis of [the fact that the alibi witnesses were Harris's friends], I have considererd all aspects, I have heard your arguments, I have heard the arguments of the state, and it is the opinion of the court that the defendant had been properly represented, that he had been given proper consideration on his appeal, both by the appellate court and the supreme court, and accordingly, this court is

> hereby denying your petition, and it is hereby dismissed.

(*Id.* at 27.)

In affirming the denial of Harris's post-conviction petition, the Illinois Appellate Court noted that in Illinois, arguments raised in post-conviction proceedings but not preserved on appeal are barred by *res judicata* if the arguments are based on facts that are of record. *See People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist. 1979). The Court then pointed out that all facts, except those relating to the alibi witnesses, were reflected in the trial court record.

After making this point, the Court did not conclude that Harris had waived his ineffective assistance claims in full, but instead went on to consider the merits of those claims. The Court's manner of addressing the claims indicates that it considered the merits of the ineffective assistance arguments with respect to the alibi witnesses as well as with respect to of-record evidence:

> Competency is determined from the totality of counsel's conduct at trial. [Citation omitted.] In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney . . . .
>
> Defendant *also* contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present alibi witnesses and to present an alibi defense.

(Respondent's Answer and Memorandum, filed 10/21/83, "Order Disposing of Appeal Under Supreme Court Rule 23", at 5-6 [post-conviction].) (emphasis added.)

The Court continued to discuss the standards of effective assistance and to evaluate the quality of the assist-

ance provided in Harris's case. For example, the Court noted trial counsel's vigorous cross-examination of Slater, which highlighted certain inconsistencies between his trial testimony and his pre-trial statements. The Court also pointed out that trial counsel has great discretion in determining which, if any, witnesses to call in his or her client's defense. According to the Court, Harris's counsel could reasonably and competently have chosen to rely on cross-examination of state witnesses and the state's failure to sustain its burden in prosecuting Harris. (*Id.* at 6.) The Court concluded that "the representation [Harris] received at trial [did not result] in substantial prejudice without which the outcome would probably have been different." (*Id.* at 7.)

It is clear that in Illinois, failure to raise on appeal the issue of ineffective assistance of trial counsel results in waiver of that issue for post-conviction review. *People v. Edmonds, supra; see* cases collected in *United States ex rel. Devine v. DeRobertis*, 754 F.2d 764, 766 n. 1 (7th Cir. 1985). These authorities indicate that an exception to the waiver rule occurs when the basis for the claim is not found in the record.

In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court held that a petitioner could not litigate collaterally in federal court an issue that state procedural law prevented from being presented to the state appellate courts. This ruling was extended by the Seventh Circuit in *United States ex rel. Spurlack v. Wolff*, 699 F.2d 354, 356 (7th Cir. 1983), to a failure to present properly preserved trial objections on appeal.

Under *Sykes*, such a "waiver" of the right to present an issue to the federal courts on collateral review may be overcome only by a showing of "cause" and resulting "prejudice." Cause and prejudice are flexible concepts,

satisfaction of which changes with the circumstances of a particular petitioner. *Clay v. Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 433-34 (7th Cir. 1984). Moreover, under circumstances constituting a "miscarriage of justice," a *Sykes* waiver, not cured by satisfaction of the cause and prejudice test, may be ignored. *Id.*

Sometimes a state court will consider the merits of an issue that may not have been properly preserved by timely objection or appeal. Where a state court ignores a procedural default and reviews the substantive merits of what would otherwise be a waived issue, federal courts must review the merits of that issue in a petition for habeas corpus. *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 951, (7th Cir. 1982). However, where a state court has clearly reached both the merits of the waiver question and the substantive merits of the improperly raised issue, the Seventh Circuit has found that absent a showing of cause and prejudice, *Sykes* bars federal collateral review. *Farmer v. Prast*, 721 F.2d 602, 605 & n. 5 (7th Cir. 1983); *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir. 1982); *see Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1243 n. 1 (7th Cir. 1984).

In the present case, the Illinois Appellate Court made clear, and respondent agrees, that the issue of ineffective assistance of counsel was not waived as to facts not in record. According to the Appellate Court, those facts include the affidavits of the four alibi witnesses. This court notes additionally that the record appears to contain no indication (1) that Harris might have been confined to Cook County Hospital shortly after the shooting as a result of a serious illness, (2) that no poolroom existed at 13th and Kedzie, and (3) that McWhorter swore that George Williams committed the shooting. Respondent argues that to the extent that Harris's ineffec-

tive assistance of counsel claim depend on trial counsel's omissions indicated in the record, the claim was waived.

The court's review of the trial and appellate opinions on post-conviction review persuades it that the Illinois state courts ignored any waiver by Harris of his right to rely on "record" omissions. The question is whether Harris's case is more like that presented by *Williams* or by *Farmer*. If more like the former case, then federal collateral review is proper with respect to all omissions raised in the amended post-conviction petition also raised in the pending petition for habeas corpus.

In *Williams*, the Illinois Appellate Court "note[d] at the outset [that] the State is correct in its argument [that] the defense counsel waived [this issue] by failing to object to the trial court's [ruling]." *People v. Ross*, 63 Ill.App.3d 884, 20 Ill.Dec. 688, 692, 380 N.E.2d 897, 901 (1st Dist. 1978). The Court followed this statement with citations to three Illinois Supreme Court cases supporting the state's waiver argument. *Id.* However, the Court never expicitly stated that the issue was waived. The Court then continued to reach the merits of the claim, finding that the improperly raised issue was substantively without merit. According to the Seventh Circuit in *Williams*, this treatment of what would otherwise be a waived claim allowed federal collateral review of that claim. *Williams*, 687 F.2d at 951.

In contrast, the *Farmer* Court, on appeal from denial of a post-conviction petition, explicitly found that the petitioner had waived his claim before examining the issue presented. *Farmer*, 721 F.2d at 605. Similarly, the Court in *Veal* distinguished an express ruling on procedural default from a mere discussion thereof for purposes of applying the *Sykes* bar to collateral review. *Veal*, 693 F.2d at 650. An express ruling on procedural default, presented as an independent and alternative ground for denying relief, prevents federal collateral review.

The treatment of Harris's claim is strikingly similar to that involved in *Ross*. In the February 22, 1983 denial of Harris's post-conviction appeal, the Court simply noted that waiver appeared to operate, but then continued to treat the merits of the improperly raised issue. Both the *Harris* and the *Ross* courts did not appear to make two rulings in the alternative, but rather to note a procedural default and then ignore it, reaching the merits instead. The court is therefore persuaded that Harris's ineffective assistance of counsel claim may be presented to the federal court with respect to all omissions raised in the amended post-conviction petition.

B. Merits of Ineffective Assistance Claim

The United States Supreme Court has recently issued two opinions concerning the scope of the sixth and fourteenth amendment right to effective assistance of counsel. *Strickland v. Washington*, —— U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, —— U.S. ——, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The Court noted the universally accepted principle that the federal constitution guarantees "reasonable effective assistance." *Strickland*, 104 S.Ct. at 2062. A convicted defendant, to prevail on an ineffective assistance of counsel claim, must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 2065.

The *Strickland* Court stressed that "[c]ounsel . . . has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," *id.*, and that "counsel's function . . . is to make the adversarial testing process work in the particular case," *id.* at 2066. Reasonable professional judgments must support counsel's actions. If counsel did not conduct a complete investigation of a particular matter, a reasonable professional basis for not conducting that inves-

tigation will defeat an ineffective assistance claim. *Id.* at 2066.

In addition to demonstrating an unreasonable professional error by counsel, a defendant must also show that the error had an effect on the judgment:

> The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 2067. The court went on to describe the circumstances under which prejudice is presumed, *see id.* at 2607; *United States v. Cronic*, 104 S.Ct. at 2046-2047 & n. 25, and under which prejudice must be affirmatively shown by defendant, *Strickland*, 104 S.Ct. at 2067-68. Where defendant must demonstrate prejudice, as in this case, the test that must be satisfied is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." When a petitioner challenges his conviction, "the question is whether there is a reasonable probability that, absent the error, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 2069.

Defendants challenging the constitutional sufficiency of their counsel must prove both parts of this test. Thus, the *Strickland* Court made clear that a finding that one part was not established obviates a decision regarding the other part. *Id.* A court may also review counsel's performance by addressing the prejudice component first, or vice versa. *Id.* When examining counsel's performance, " 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' that might be considered sound trial strategy." *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir. 1984) (citing *Strickland*, 104 S.Ct. at 2065-66). *E.g.*, *McKinney v. Israel*, 740 F.2d 491, 492 (7th Cir. 1984) (court addressed only prejudice element and finding lack thereof, declined to reverse denial of writ); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) (finding of incompetent counsel performance without resultant prejudice, court affirmed denial of writ).

Regarding proper defense counsel preparation, the Seventh Circuit has explained:

> It is undisputed that a defense counsel "should make reasonable investigations into all defenses," *United States v. Zylstra*, 713 F.2d [1332] at 1338 [(7th Cir. 1983)], and that such investigations encompass the interviewing of witnesses. *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc) (plurality opinion).

Arrowood v. Clusen, 732 F.2d 1364, 1370 (7th Cir.1984). In *Crisp v. Duckworth*, the Seventh Circuit examined extensively claims of ineffective assistance of counsel at the investigation and trial preparation stages, the stages implicated in the present petition. In that opinion, the Court stressed again the importance of pretrial investigation to reasonably competent representation:

> Effective representation hinges on adequate investigation and pre-trial preparation. *See United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21, 24-25 (7th Cir.1976) (as corrected) (mere appearance of in-court effectiveness cannot compensate for inadequate pre-trial preparation). . . . Investigation may help an attorney develop or even discover a defense, locate witnesses, or unveil impeachment evidence. Though there may

> be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation. [Citations omitted.]
>
> * * * *
>
> We do not agree that police statements can generally serve as an adequate substitute for a personal interview. *See United States v. Tucker*, 716 F.2d [756] at 583 & n. 17 [(9th Cir. 1983)]; *United States v. DeCoster*, 487 F.2d [1197] at 1204 [(D.C.Cir. 1973)] ("a defense attorney . . . should interview not only his own witnesses but also those that the government intends to call").

743 F.2d at 583-584. It is true that a defense attorney's discretion is broad, and that so-called "trial strategy" may excuse omissions that otherwise would appear inexcusable. However, the Seventh Circuit clearly recognized in *Crisp* that

> [t]hough there may be instances when the decision not to contact a potential defense witness is justified, [citation omitted], an attorney who fails even to interview a readily available witness whose noncumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the shield of "trial strategy and tactics," [citation omitted]; *see also Davis v. Alabama*, 596 F.2d [1214] at 1217 [(5th Cir. 1979)] ("An attorney does not provide effective assistance of counsel if he fails to investigate sources of evidence which may be helpful to the defense."); *United States v. DeCoster*, 487 F.2d at 1201 (A court should not "second guess strategic and tactical choices made by trial counsel. However, when counsel's choices are uninformed . . . a defendant is denied the effective assistance of counsel.")

743 F.2d at 584.

In this case, Harris claims that his counsel failed to interview and to call numerous witnesses. Some of the omissions could have led to impeachment, such as Slater's claim that he voluntarily appeared at the police department, that he did not hang around the crime scene area, and that there was a poolroom on Kedzie and 13th where he frequently saw Harris and knew him as "Wayne." In a case dependent solely on eye witness identification, where the identification is bolstered by the witness's prior knowledge of the defendant, this impeachment is important. Counsel's alleged failure to investigate certain witnesses could also amount to ineffective assistance of counsel. For example, Harris claims that his counsel did not interview Carter and Riles, who were present on the first day of trial. These two witnesses identified two men running from the scene of the crime. One of the men was McWhorter, according to both witnesses, and the other's identity is unclear. Riles told the police she could identify the other if shown his picture. Perhaps Riles and Carter could have identified Williams as the man running from the scene with McWhorter (Williams claims he was with McWhorter that night). This testimony could have been offered by the defense as an exculpatory version of the shooting. Finally, alibi witnesses, willing and available, were not called and the hospital records allegedly were not checked.

Taking Harris's allegations as true, his trial counsel's failure to conduct the above-described investigations would fall below the standard of reasonably competent representation. It is axiomatic that a defense counsel must interview witnesses to the crime and alibi witnesses. Trial counsel should also interview witnesses such as Riles and Carter, who did not witness the shooting but who observed areas near the crime scene at the time of the shooting. Finally, possible suspects, such as Williams, should be interviewed as possibly providing an alternative, exculpatory version of the events. (Such a version was alluded to by Kuhlen in Harris's opening statement.)

Respondent, the party moving for summary judgment, offers the October 14, 1983 affidavit of Todd Musberger as evidence of Musberger's competency. Musberger states that, "My best recollection is that Alice Riles and Leroy Carter were among the witnesses that could not be located. All police witnesses were interviewed before the trial and each cross examination was made with the most effective trial strategy in mind." (Respondent's Answer and Motion, filed 10/21/83, Musberger Affidavit.) However, the trial record indicates that Riles and Carter were in court on the day trial started, (Tr. 23), at least one because of Musberger's subpoena. This inconsistency, plus Musberger's failure to state explicitly whether he interviewed these two witnesses, prevent the court from determining on this motion that Musberger did investigate these witnesses and make an informed judgment regarding use of their testimony at trial.

Regarding the alibi witnesses, Musberger states:

> On two occasions that I presently recall, I interviewed Jewel Connor, Mary Connor and Genise Connor. I recall interviewing Thomas Charles on one occasion. It was my considered opinion that the jury would not find these people credible. Therefore I decided as a matter of trial strategy not to call any of these people as witnesses at Mr. Harris's trial.

(*Id.*) Musberger does not indicate whether he checked the Cook County Hospital records in an attempt to corroborate this story.

In the affidavits of the alibi witnesses, Z. Mary Connor and Genise Connor state that they were available to testify and were not called, but do not mention whether Musberger interviewed them. Jewel Connor's affidavit indicates that she twice contacted Musberger in an attempt to explain her story to him. Musberger's affidavit is thus technically consistent with these alibi witness

affidavits, although Musberger provides no reason for his conclusion that the witnesses were not credible.

Musberger states that he interviewed all police witnesses. As Harris does not claim that Musberger did not interview McWhorter, the court will assume that McWhorter was interviewed. Musberger does not expressly state that he interviewed Williams, who could have testified that Harris was not at the scene of the shooting.

Musberger does not respond to Harris's claims concerning impeachment evidence. While Musberger may not have been allowed to present extrinsic impeachment evidence, reasonably competent counsel should investigate possible avenues of impeachment. The evidence that Slater could not have known Harris through frequent contacts at a poolroom which allegedly did not exist is such an apparent avenue of impeachment.

This discussion reveals that one part of the ineffective assistance of counsel test—that pertaining to reasonably competent professional representation—cannot be decided on this motion. Musberger's affidavit is too general to answer all of Harris's claims. The court may deny a claim of ineffective assistance, however, if the prejudice component is not satisfied. Should Harris's allegations be true, however, he may have satisfied the prejudice test. On this record and with Musberger's conclusory affidavit, the court cannot make a finding that the alibi witnesses were not credible. Moreover, impeachment of Slater additional to that accomplished at trial would cast further doubt on the reliability of the verdict. This is especially true regarding the nonexistence of a poolroom at 13th and Kedzie, which would impeach Slater's credibility as well as his identification. Finally, the alternative possible version of events, that Williams or McWhorter may have been responsible for the shooting, also casts further doubt on the verdict. Hence, both the competence of counsel's representation and the possible prejudice re-

sulting therefrom should be examined in an evidentiary hearing. Such a hearing is appropriate when facts are in dispute and petitioner was not afforded a full and fair hearing on the ineffective assistance issue in the state system. *Townsend v. Sain*, 372 U.S. 293, 312-13, 83 S.Ct. 745, 756-57, 9 L.Ed.2d 770 (1963).

Respondent's motion for summary judgment as to ineffective assistance of counsel is denied. An evidentiary hearing on this claim will be set. Harris will be appointed counsel to aid him in this hearing. Rules Governing § 2254 Cases, 28 U.S.C. fol. § 2254, Rule 8(c).

III. Newly Discovered Evidence

Harris's third claim is that his custody violates the federal constitution, as newly discovered evidence demonstrates he is innocent of the charged crime. In Harris's original post-conviction petition, which Abrahams states she filed on July 17, 1979, Harris requested a new trial based on newly discovered evidence and on ineffective assistance of counsel. Paragraphs 1 through 6 contain the allegations of newly discovered evidence, namely, the affidavit testimony of Melvin McWhorter. The affidavit reads in part:

> I was acquainted with Pete Earnest Howard befor [sic] he was killed and have on occasion, purchased narcotics from him.
>
> On July 9, 1977, about 10:00 P.M., I was present in the fifteen-hundred block of South Christiana Avenue and consequently, witnessed the shooting of Mr. Howard. He was shot by George Williams, whom I have known for over twelve (12) years.
>
> I am also acquainted with Antonio Slater. . . . On July 9, 1977, Antonio Slater was not present in the fifteen-hundred block of South Christiana at 10:00 oclock [sic] pm. the night Pete Earnest Howard was killed.

(McWhorter Aff., dated June 29, 1979.) Harris alleges in his original post-conviction petition that this evidence was not and could not have been discovered by him or his counsel at an earlier date.

The amended post-conviction petition, however, omits the claim of newly discovered evidence. Rather, the entire claim rests on the allegation of ineffective assistance of counsel. No mention is made of the McWhorter affidavit, although it was incorporated as an exhibit to the amended petition. (Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 1-6 [Transcript].) At the March 19, 1979 hearing, Harris's attorney Hardiman did not mention the McWhorter evidence.

As discussed above, the lower post-conviction court found that Harris had been provided effective assistance of counsel. It did not mention newly discovered evidence. On appeal of the post-conviction petition, it is clear that ineffective assistance was also the only issue presented. (*See* Motion of Exceptions, filed 8/20/82, Exhibit [Brief and Argument for Petitioner-Appellant].) The Appellate Court clearly reached only the ineffective assistance argument. Although it noted the McWhorter affidavit on page 3, the Court failed to mention it again in the opinion.

In Illinois, in order to obtain a new trial based on newly discovered evidence, a defendant must show that the evidence could not have been produced at trial by use of reasonable diligence, that the evidence is non-cumulative, and that the evidence is of such a conclusive character that it would probably change the result. *People v. Sullivan*, 95 Ill.App.3d 571, 51 Ill.Dec. 60, 420 N.E.2d 474 (1st Dist.1981). Motions for new trial are subject to close scrutiny, *People v. Carpenter*, 74 Ill.App. 3d 770, 30 Ill.Dec. 395, 393 N.E.2d 50 (1st Dist.1979), and have been frequently characterized as "disfavored," *e.g.*, *People v. Wolf*, 48 Ill.App.3d 736, 6 Ill.Dec. 720, 363 N.E.2d 402 (2d Dist.1977), *cert. denied*, 435 U.S.

915, 98 S.Ct. 1469, 55 L.Ed.2d 506 (1978); *cf. United States v. Feldman*, 756 F.2d 556, 560 (7th Cir.1983).

Newly discovered evidence must be presented to the trial court in a moton for new trial. Motions for new trial are governed by Ill.Rev.Stat. ch. 38, ¶ 116-1, which provides that they must be brought "within 30 days following the entry of a finding or the return of a verdict." *Id* at ¶ 116-1(b). Exceptions to this 30-day requirement are narrow. *People v. Ferguson*, 102 Ill.App.3d 702, 57 Ill.Dec. 958, 429 N.E.2d 1321 (1st Dist.1981), *cert. denied*, 459 U.S. 872, 103 S.Ct. 159, 74 L.Ed.2d 133 (1982) (where sole prosecution witness recants or where prosecution prevented defendant from discovering evidence). Harris has not alleged compliance with these procedures. Moreover, Harris does not claim that these procedures themselves violate his federal due process rights. *Cf. Griswold v. Greer*, 712 F.2d 1200, 1205 (7th Cir.1983).

A. Waiver

The court will assume that Harris filed a timely motion for new trial based on newly discovered evidence. However, unlike the ineffective assistance of counsel argument, the newly discovered evidence argument was not presented to nor considered by the reviewing Illinois courts. As described above, Harris omitted to make this claim before both the post-conviction and the direct appeal lower and appellate courts. Hence, this court is barred from considering the merits of the claim. *Wainwright v. Sykes, supra.* Harris has advanced no explanation for this procedural default.

B. Merits of Newly Discovered Evidence Claim

Were the court to consider this issue, review would be narrow. In a federal habeas action, courts review the state proceedings for violations of federal constitutional rights. 28 U.S.C. § 2254(a). Hence, a federal court will

not review the merits of a state court's denial of a new trial motion solely under the state standards for the granting of a new trial. *United States ex rel. Guillen v. DeRobertis*, 580 F.Supp. 1551, 1556 (N.D.Ill.1984).

The scope of federal habeas corpus review concerning newly discovered evidence is described in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In that case, the Court explained:

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

Id. at 317, 83 S.Ct. at 759. This reason has led courts to the principle that a denial of a motion for new trial based on newly discovered evidence may be reviewed only for the presence of an error of constitutional magnitude. *Subilosky v. Callahan*, 689 F.2d 7, 9 (1st Cir.1982), *cert. denied*, 460 U.S. 1090, 103 S.Ct. 1788, 76 L.Ed.2d 356 (1983); *Guillen*, 580 F.Supp. at 1556. The Fifth Circuit has explained this test as follows:

> Questions of guilt or innocence are not matters to be considered upon petition for habeas corpus. . . . Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not to its legality. . . . [T]he confession 'might be urged as a proper subject for executive clemency, but it affords no basis for judicial action.'

Anderson v. Maggio, 555 F.2d 447, 451 (5th Cir.1977) (citing *Shave v. Ellis*, 255 F.2d 509, 511 (5th Cir.1958)).

This discussion is consistent with the Supreme Court's analysis that a petitioner in Harris's position have some "justifiable reason" for failing to present the newly discovered evidence to the trial court. *Townsend v. Sain*, 372 U.S. at 317, 83 S.Ct. at 759.

Even assuming, however, that this court should apply the standards the Illinois courts would apply to a newly discovered evidence claim, Harris has not satisfied those standards. First, it is clear that McWhorter was known to Harris and his counsel at least at the time of the state's disclosure of certain police reports in pre-trial discovery. Harris does not explain why he or his counsel could not obtain McWhorter's statement before trial. Moreover, Harris does not claim that his counsel was ineffective with respect to investigation of McWhorter. Hence, Harris has not offered a "justifiable reason" for not presenting this evidence at trial. Second, the lack of credibility of the McWhorter testimony would also justify a finding by the Illinois courts that the evidence was not of such a conclusive character as to make it probable that the result would be different. On two occasions before the execution of the affidavit, McWhorter had stated that he did not see the shooting. His third story was thus subject to damaging impeachment. Harris's failure to satisfy this standard, which is at least as demanding as any federal constitutional standard would be, provides a second, alternative, reason to grant respondent's motion for summary judgment as to the newly discovered evidence claim.

IV. Sufficiency of the Evidence

Harris's final claim is that the evidence presented by the state was constitutionally inadequate to support his conviction. The Illinois Appellate Court examined the record on the question of sufficiency and affirmed Harris's conviction. A question is raised as to the test to

be applied in determining the sufficiency of the evidence in a § 2254 case.

The Seventh Circuit clearly applies the so-called "reasonable doubt" test in determining whether federal convictions are supported by constitutionally sufficient evidence. *United States v. Moya*, 721 F.2d 606, 609-10 (7th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1312, 79 L.Ed.2d 709 (1984); *United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 972, 83 L.Ed.2d 975 (1985). The "reasonable doubt" test is satisfied when a reviewing court finds that, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Foster*, 741 F.2d at 1012. In applying this test, the reviewing court must "assume that the jury drew all reasonable inferences in the prosecution's favor. . . ." *Id. See also United States v. Herrera*, 757 F.2d 144, 149-150 (7th Cir.1985).

The Seventh Circuit has applied this test in reviewing state court convictions as well. *See Foster, supra; Rowan v. Owens*, 752 F.2d 1186, 1187 (7th Cir.1984). There is some question as to whether this test would apply to an Illinois conviction based only on circumstantial evidence, *see Foster*, 741 F.2d at 1012-13, but the present case does not require resolution of this issue.

The court has carefully reviewed the trial transcript in this case. The review centers on what was presented at trial, not what could or should have been raised therein. The present record therefore supports Harris's conviction with sufficient evidence. The jury was presented with the occurrence testimony of Antonio Slater. As discussed above, Slater testified that he witnessed the shooting, and that Harris, whom he knew as "Wayne," was the perpetrator. Slater further testified that he had

at least a few seconds to view the perpetrator's face, which was illuminated both by street lights and by Slater's headlights. Additionally, Slater's identification was enhanced by his prior knowledge of Harris. Harris's cross-examination of Slater, while lengthy, delved into minor inconsistencies in Slater's story. This cross-examination affected the weight of Slater's testimony, but cannot be characterized as destroying his credibility or the consistency between his pre-trial and in-court stories.

The jury could reasonably believe Slater's testimony and his ability to identify the perpetrator. A rational jury thus could have found the elements of the offense of murder beyond a reasonable doubt. Whether that would have been the finding if Harris's counsel had taken the course of defense recommended by Harris is not relevant to the present inquiry concerning sufficiency of the evidence. Respondent's motion for summary judgment on this ground is therefore granted.

Conclusion

Respondent's motion for summary judgment is granted except as to the ineffective assistance of counsel claim. An evidentiary hearing shall be held on the remaining claim. The court will appoint an attorney for Harris under Rule 8(c), 28 U.S.C. fol. § 2254.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title Omitted in Printing)

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This petition for a writ of habeas corpus, 28 U.S.C. § 2254, is before the court for entry of findings of fact and conclusions of law. Petitioner Warren Harris alleges that he was denied effective assistance of counsel at this state court trial for murder and is therefore incarcerated in violation of the Sixth Amendment to the United States Constitution, as applied against the states through the Fourteenth Amendment. On April 8, 1985, this court denied the respondent's motion for summary judgment. That opinion is reported at 608 F.Supp. 1326. An evidentiary hearing was held over three days in November of 1985, and post-trial memoranda became fully briefed on February 26, 1986. Although this is a close and difficult case, the court determines that petitioner has not met his burden of showing that his conviction was constitutionally invalid, and therefore enters judgment for respondent.

Findings of Fact

The chief omissions of which petitioner complains concern trial counsel's failure to interview and call certain occurrence witnesses who might have identified someone other than petitioner as the assailant, and trial counsel's failure to call proffered alibi witnesses to the stand. Other trial errors are alleged as well. In order

to assess the merits, a full history of counsel's pre-trial and trial performance is necessary.[1]

1. Pursuant to a two-count information, petitioner Warren Lee Harris was charged with the murder of one Ernest ("Pete") Howard in August of 1977. Petitioner entered a plea of not guilty and Todd Musburger of the Cook County Public Defender's Office was appointed to represent him. Musburger had been with the public defender's office for about four years. Harris's case was Musburger's first murder jury trial, although he had conducted several felony jury trials. Musburger was joined by Kathryn Kuhlen as co-counsel.

2. On September 7, 1977, a preliminary hearing was conducted before the Honorable David J. Shields of the Circuit Court. The chief witness at the preliminary hearing was Antonio Slater, who testified that on July 9, 1977, at approximately 10:00 p.m., he was driving on the 1500 block of South Christiana Street in the City of Chicago. At that time, Slater heard a gunshot and saw a man fall to the ground. He looked around and saw another man with a pistol in his hand run to a Buick Electra and get in. Slater testified that he recognized the man as petitioner, whom he had seen periodically in the vicinity of a liquor store at 13th and Kedzie Streets, and knew as "Wayne."

3. On cross-examination, Musburger elicited that Slater did not hang out on South Christiana regularly, that Slater had turned off onto Christiana from Douglas Street, and that Slater had been stopped on the street for between 3 to 5 minutes because the Buick Electra had blocked his way. Slater testified that the man he saw running away from the victim was a 5'11" black male,

[1] Designations to the hearing transcript are by Volume Number, (I, II, or III) and page number. References to exhibits are to petitioner's exhibits unless otherwise noted, and references to the state court trial transcript are noted as "Tr."

weighing approximately 165 pounds, and wearing black pants and a beige knitted sweater. Slater added that Christiana has orange streetlights, but that the incident did not occur under one. Musburger attempted to elicit information as to how and when Slater first spoke to the police, but the court sustained objections to this line of questioning.

4. Pursuant to pre-trial discovery, counsel for the defense obtained copies of the police reports relative to the investigation of Howard's homicide. By virtue of these materials, counsel learned the following (the reports contained addresses and phone numbers for all witnesses):

A. Laverne Tapes, the victim's common-law wife, informed the police that the victim, Ernest Howard, was a dope dealer who usually dealt in the area of 16th and Christiana. (Ex. 39)

B. Maurice Williams was at about 16th and Christiana on July 9, 1977 when he heard a gun shot and heard Howard call his name. Howard told Williams that he had been robbed and knew the offenders, but did not mention their names. (Exs. 38, 41).

C. Betty Larry, common-law wife of Maurice Williams, informed the police immediately after the shooting that Curtiss Fowlkes had witnessed the incident and had told her that Howard's assailants were two male negroes, one of whom wore a red shirt and dark pants, and that they had fled the area driving a maroon and white 1968 Buick Electra. (Ex. 38)

D. Larry also told the police that Joanne Hightie had told her that she (Hightie) had seen two male negroes running through a playlot at 1521 S. Christiana immediately after the shooting, that one of them had on a red T-shirt with dark pants, and

that the other was wearing a white T-shirt. According to Larry, Hightie had also seen a white-maroon Buick Electra 225, but the vehicle had three occupants. Larry herself recalled that at the time she had spoken to Fowlkes, a male negro wearing a white T-shirt appeared to be with Fowlkes. (Ex. 39).

E. After some initial difficulties locating him, the police interviewed Curtiss Fowlkes, who stated that he had seen Howard and a man wearing a red shirt talking near the corner of 16th and Christiana Street. Fowlkes turned away for a few seconds and heard a shot. When he turned around, he saw Howard fall to the ground and then saw the man in the red shirt enter a grey 1968 Buick Electra with chrome manifold pipes. Fowlkes described the man as being a male negro, age 25-26, 5'10" to 6' tall, with a medium build and an afro haircut. This description fit petitioner.

F. Leroy Carter, 1528 South Christiana, was also interviewed by the police. Carter indicated that he had been sitting in his car with his girlfriend (Joanne Hightie) in front of 1528 South Christiana with the radio on, the windows closed, and the air conditioner running. At about 10:00 p.m., Carter saw the described man with the white T-shirt running into the playground in a northeast direction from 16th and Christiana. (Ex. 41).

G. Rose Anderson indicated that the same man described by Carter approached her at a neighborhood tavern just before midnight, told her he had been with "Pete" at the time of the shooting, and asked if Pete had died yet. Anderson added that before she could respond, the man noted Darryl Tapes, the victim's brother-in-law, arriving, and left hurriedly. (Ex. 40). Through Anderson's cousin, the police learned that the man was known as "Buster" and lived in the vicinity of 12th and Lawndale.

H. Clarence Gibson, a friend of the decedent, told police that on the night of the incident, he heard a shot, went outside and met "Buster" who was walking toward 16th Street. Buster informed Gibson that "Pete" had been shot, and the two men went back to the scene of the crime to watch the police carry the body away.

I. The police also interviewed Alice Marie Riles, 1515 S. Christiana, who related that she had been sitting on the front porch of her house when she heard a shot. Immediately thereafter, Riles saw two men running in a northeasterly direction and into a vacant lot near the playlot described by Carter and Hightie.

J. The police located Buster, now identified as Melvin McWhorter of 1306 S. Lawndale. McWhorter agreed to come to Area 4 headquarters for questioning, was advised of his rights, and then denied any knowledge of the shooting.

K. Both Riles and Carter, separately viewing a lineup, positively identified McWhorter as the man running through the playlot around the time of the shooting. (Exs. 43, 44). Upon further questioning, McWhorter stated that he was with one George Williams (a/k/a "PRO") at the time of the shooting.

L. At a later date, McWhorter admitted being untruthful in his earlier interview, and related that on the evening of the homicide he and George Williams had gone to 16th and Christiana to buy narcotics. Standing in the vacant lot on the east side of Christiana, McWhorter noticed several persons on the west side of the street, including petitioner Warren Harris. McWhorter said he did not see Howard at that time, or he would have bought dope from him. McWhorter then heard a gunshot and saw Harris walking south on Christiana and then west

on 16th Street away from the shooting. McWhorter further related that on Tuesday, July 12, 1977, Harris approached both him and George Williams and warned that they would be harmed if they told anyone Harris had been present when Howard was shot. McWhorter had known Harris for about four years and positively identified a photo of him.

M. On August 3, 1977, the police finally located and interviewed George Williams. Williams told the police that he and McWhorter were standing in a gangway across the street from where Howard was later found when they heard a shot. Williams walked across the street and saw the victim and numerous other persons in the surrounding area. Williams was asked if he saw Harris at the scene, and he answered no but that he had heard from some persons in the area that Harris was the killer. (Ex. 46).

N. Through an unidentified informant, police later were informed that one Antonio Slater had witnessed the incident; Slater was located on August 19th and gave the police a written statement. This statement largely corroborated Slater's testimony except for the important fact that Slater said he had driven onto Christiana from 16th Street, not Douglas Street as later testified. (Christiana is a one-way southbound street, and 16th Street is south of the block where Howard was killed.) Slater also mentioned that his headlights had caught Harris's face, and that Harris got into the Buick and drove off passing him. Slater then looked at a group of five photos and identified Harris as the shooter.

O. Based on Slater's statement, Harris was apprehended for investigation. The police found Harris lying in the rear seat of a parked auto at 1201 S. Lawndale, arrested him, and advised him of his rights. Harris said he was not present when the victim was shot and would not make any further

statements. The police charged Harris with murder and officers were ordered to locate Curtiss Fowlkes to see if he could identify Harris. The record nowhere reveals whether Fowlkes was ever located.

5. Based on the foregoing, Musburger obtained through further discovery the rap sheets of McWhorter, George Williams, Darryl Tapes, Betty Larry, Curtiss Fowlkes, Leroy Carter, and others named in the police report but of no consequence here. Antonio Slater had no criminal record; the other witnesses all did.

6. Musburger could not recall what specific efforts he made to interview the witnesses named in the police files. He recalled making such efforts generally but having very little success in finding witnesses whose testimony would have been helpful. (I. 82, 103). He specifically recalled attempting to interview a man in a basement apartment who refused to cooperate, and remembered speaking to two women across the street from that apartment who told him that if called to testify they would identify Harris as the shooter. (I. 103). At his deposition, Musburger recalled that these women had previously said something helpful to the police. (Ex. 2, pp. 47-49). He could remember no names for these witnesses, but conjectured at the hearing that Alice Riles was probably not one of the two witnesses. Although Leroy Carter lived in a basement apartment on Christiana, he testified that he never spoke to a defense attorney before trial. The court finds it probable that neither Carter nor Riles were among the witnesses contacted prior to trial.

7. Musburger made no attempt to interview Antonio Slater further, and either could not find George Williams or could not get George Williams to cooperate. There is no evidence as to whether Musburger did or did not interview McWhorter, but Harris has never alleged that Musburger failed to interview McWhorter, or that he (Harris) was prejudiced by this failure.

8. Initially, Harris informed Musburger that he had been in Cook County Hospital on or around the night of the murder, July 9, 1977, and therefore couldn't have committed the crime. Harris testified that he never claimed to have been in the hospital on July 9th, but Musburger remembered otherwise. Although Musburger's memory was sketchy, and Harris did not strike the court as a liar, the court believes that Musburger's memory is probably accurate on this point. Musburger subpoenaed the hospital records to learn that Harris had entered Cook County Hospital on July 13, 1977, after the crime occurred, and had told the doctors on entering that he had been injecting heroin as recently as two days before. (Resp. Ex. 5). Those records also revealed that Harris had been released from Madden Mental Health Center in Hines, Illinois, where he had been treated for hallucinations, on July 7, 1977. (I. 23; Ex. 68). There is no evidence that Musburger subpoenaed these other medical records, and probably he did not.

9. Prior to trial, Musburger spoke with a group of three to six people, including petitioner's mother, Emma Harris, petitioner's common-law wife Jewel Connors, and possibly Jewel's sister Genise Connors. These people informed him that petitioner had been ill at the Connors' home on the day of the incident. (II. 35). Musburger spoke with these people at least twice (I. 13), but determined that they were not believable and would not have withstood cross-examination. He recalled thinking that the witnesses were inconsistent among themselves, although he could not remember specifics, and that some or all of them seemed to be high on drugs. (I. 74-76; II. 25-26). His notes reflect that Mrs. Harris had also informed him she was "positive Warren was home sick with her." (Ex. 65). Musburger's disbelief in these witnesses was fueled by his frustration that Harris's earlier hospital alibi had proven false. (I. 90-92; II. 26).

10. Musburger also spoke with two men whom Mrs. Harris identified at trial as being Ronnie Harris, Warren's brother, and Jim Greer, a friend of Ronnie's. (II. 37-38, 82). Both men were willing to testify that Slater and McWhorter were friends and that they had seen the two men together in Chicago's Central Park on the south side. (II. 37-38). Musburger's trial notes make reference to Ronnie Harris and the Central Park area (Ex. 66), but Musburger had no recollection of the names or the allegation. Neither witness was called to testify at trial.

11. Musburger did recall a general concern that Harris's proposed witnesses appeared to be heroin addicts. (I. 75, 96). He emphasized that it was his strategy to keep out any reference to heroin abuse lest the jurors be prejudiced against Harris for drug involvement. (I. 97). While there is no evidence other than Musburger's impression that these witnesses were in fact drug users, the court has no basis for concluding that his perception was demonstrably incorrect.

12. Musburger and co-counsel Kuhlen did not visit the scene of the crime until approximately one month before trial, at which time there was snow on the ground and the leaves were off the trees. (I. 24-25). Although the crime occurred on a summer's night, the only photos of the scene prepared by the defense were taken in the winter during daylight hours.

13. After the preliminary hearing, Musburger never verified whether in fact there was a liquor store at 13th and Kedzie where Slater might have seen Harris. There is in fact a billiards parlor at that corner where liquor is apparently sold.

14. On December 15, 1977, the defense answered ready for trial and jury selection in *People v. Harris* before the Honorable Louis Garippo of the Circuit Court. By this time, defense counsel had abandoned any interest in an alibi defense, and intended to rely on the state's inability to prove Harris guilty beyond a reasonable doubt. (Ex.

14). Prior to the opening statement, Laverne Tapes, Alice Riles, Leroy Carter, and a Mr. Tapes (presumably Darryl) were identified as being present in the courtroom. (Ex. 1, p. 22-23). Musburger informed the court that Tapes and Riles had been subpoenaed. *Id.*

15. Upon conclusion of the prosecution's opening statement, Kuhlen made the opening statement for petitioner. In her statement, she identified Melvin McWhorter (who had not been mentioned in the prosecutor's opening) and made the following remarks:

> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.
>
> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identifled him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that he had gone into the neighborhood to purchase narcotics, that he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Tr. 31-33). Kuhlen continued, discussing how Slater's statement to the police six weeks after the shooting switched the focus of suspicion from McWhorter to Harris, and asking the jury to examine closely Slater's credibility.

16. Musburger recalled interviewing witnesses during the course of trial, without substantive results. (I. 103; II. 11-12). Just before opening statement, Kuhlen advised the court that both Alice Riles and Leroy Carter "might be called in rebuttal, depending on what the state has." (Tr. 23). Leroy Carter recalled that on the day he showed up at the courtroom he spoke in the hallway with a male lawyer who told him that they might need him and then they might not. (III. 11-12, 21). The court finds that the person was probably Musburger, even though Musburger himself did not recall the interview, since Carter would have been of no use to the prosecution. Had Carter been called to testify, he would have said that he saw a man other than Harris running across a playlot shortly after the shooting, and that the man was the same he'd identified at the police line-up. Carter did not witness the shooting, however, and could not remember at the evidentiary hearing whether he'd seen a Buick Electra or not. (III. 6, 17).

17. The state called six witnesses: Howard's father, to testify to the fact of death; Maurice Williams, who came to the victim's aid just after the shooting; Officer Joseph Michello, who appeared on the scene shortly thereafter; Antonio Slater; the officer who arrested Harris; and the doctor who performed the autopsy.

18. On direct examination, Williams was asked whether he knew a person by the name of Buster. He said yes, and, in response to further questions, said he saw Buster at the crime scene sometime after the police arrived. (Tr. 46). On cross-examination, he reiterated that it wasn't until *after* the police arrived that he saw Buster. (Tr. 51).

19. During the prosecutor's case, Musburger made an oral motion in limine to preclude the state from eliciting any testimony as to threats Antonio Slater had received in connection with the case. The prosecutor represented

to the court that shortly after Harris's arrest, Slater's automobile was shot up. Harris himself was in custody at the time. The prosecutor advised it would not elicit the information on direct examination, and the matter was dropped. (Tr. 54-55).

20. Slater was the sole witness at trial to identify Harris. Slater testified on direct examination that he was driving Southbound on Christiana from Douglas Street when he heard a shot and witnessed a man push down another man, who fell. The man who remained standing then turned and ran to a Buick Electra sitting in the street, momentarily faced Slater, pulled up a pistol at Slater, and jumped into the passenger seat of the car. Slater's headlights picked up the man's waist, and Slater recognized the man as Wayne, whom he knew from a poolroom at 13th and Kedzie. Slater also pointed out Harris in the courtroom and mentioned that gold street lights along Christiana were lit. Slater further testified that he went to the police station on his own, and that he didn't know anyone by the name of Buster or Melvin McWhorter.

21. On cross-examination, Musburger brought out that Slater had waited almost six weeks before talking to the police. Musburger also highlighted several inconsistencies between Slater's pretrial statements and his trial testimony. In particular, Musburger brought out that Slater's signed statement to the police refers to turning onto Christiana from 16th Street, not Douglas; that Slater told the police that Harris got into a car which "drove off past" him instead of one which blocked his way in front; and that he told the police a whole bunch of people came around after the shooting but said at trial that he saw no one else other than Howard and petitioner. Slater was also impeached as to whether his car was stopped for mere seconds or a few minutes, and admitted that he had not seen Harris at the poolroom for over two years. Musburger did not impeach Slater's

statement that he had gone to the police voluntarily, that there were streetlights, or Slater's statement at trial that he knew Harris from a poolroom (as opposed to a liquor store) at 13th and Kedzie. (I. 27).

22. On December 21, 1977, the defense rested without putting on any evidence. Harris first learned of counsel's decision not to put on a defense earlier that morning, when Musburger advised him that Slater had been successfully impeached. (II. 78). Harris went along on counsel's advice. Musburger recalled that at the time the state closed their case, he and Kuhlen felt that the prosecution's case was weak and that the jury "would be out a very short time and give a not guilty to our client," and that this was the "biggest reason" why no witnesses were called. (II. 32). Musburger also must have been aware that this meant abandoning the McWhorter line of defense, since he orally moved to preclude the state from commenting in closing on Kuhlen's opening statement. (Tr. 128).

23. Later that same day, the jury returned a verdict of guilty. Immediately afterwards, the alibi witnesses angrily confronted Musburger outside the courtroom to ask why no witnesses had been called in Harris's defense. Musburger recalled the confrontation as "not a comfortable moment." (I. 22).

24. Charles Thomas, a letter carrier for the United States Post Office since 1969, was at the time of petitioner's trial the common-law husband of Genise Connors, the sister of petitioner's common-law wife, and knew Warren socially. Thomas was available to testify at petitioner's trial but was never contacted by petitioner's lawyer. Had Thomas been called, he would have been willing to testify that petitioner was home sick the evening of the murder, July 9th. Thomas recalled being at the Connors' house after he got off work that day to assist them in preparing for movers who were to come

the next day. (II. 56). Thomas was a credible witness, has an honorable discharge from the army, and would not have presented the drug problems that Musburger noticed with petitioner's other proposed witnesses. However, Thomas's testimony would not have been terribly helpful, since the only reason he was sure of the date was that Genise had told him it was the day "that Warren was at the hospital and we was all moving and everything." (II. 53).

25. Genise Connors is a high school graduate and is presently employed as a lab technician at Chicago Rawhide. (III. 32-33). In July of 1977, Ms. Connors' mother and Jewel Connors lived at 1106 S. Independence, Chicago, Illinois. (III. 34). Genise Connors spoke to Musburger on two occasions prior to trial and informed him that she was willing to testify. (III. 40-42). She was never called to testify at petitioner's trial.

Had Genise Connors appeared at petitioner's trial, she would have testified that petitioner was home sick on the evening of July 9, 1977, while she and the other members of her family were engaged in packing and loading her mother's house incident to Mrs. Connors' move to Mississippi. Genise Connors' testimony as to the events of July 9, 1977, were not credible. She knew Harris was sick in bed one night during three days of packing, but she couldn't single out which one. (III. 36-37, 43-44). The only thing Connors could distinctly remember at the evidentiary hearing was that Harris was arrested on the corner outside her home on Independence the day or so after the move. (III. 45-46, 50). According to the state court trial testimony, the police records, and petitioner's own testimony here, petitioner was arrested more than a month later at a different location. (III. 63). Connors' certainty on this clearly erroneous point led me to believe that she was not a credible witness, and most likely would not have been a credible alibi witness back in 1977.

26. Harris himself testified to being home sick around the night of the move, and said he was sure of the date because of his release from the hospital. Records show, however, that Lawrence Moving came to the Connors house on July 8th, the day before the murder. Thomas remembered the events happening before the movers came, on a day he worked, and apparently on a day Genise said Warren had been at the hospital. The court finds that Warren was home sick one night in early July, but that the evening in question was probably Thursday, July 7, 1977 (the date petitioner was released from Madden), or even Friday, July 8, 1977, but probably not Saturday, July 9, 1977.

Conclusions of Law

1. Under *Strickland v. Washington*, 104 S.Ct. 2052 (1984), a criminal defendant who wishes to set aside his conviction for ineffective assistance of counsel must demonstrate that "counsel's representation fell below an objective standard of reasonableness," *id.* at 2065, and that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

2. The "reasonable probability" standard of *Strickland* is more restrictive than the standard applied by the Seventh Circuit in *United States ex rel. Cosey v. Wolff*, 727 F.2d 656, 658 (7th Cir. 1984), where the court said: "Once a court finds that . . . the counsel's [unprofessional] acts or omissions may have impaired the defense, the burden of proof is on the government to prove beyond a reasonable doubt that the trial counsel's ineffective assistance did not affect the verdict." In effect, petitioner must show that the error was probably not harmless. However, a habeas petitioner raising an ineffectiveness claim need *not* show that counsel's performance "more

likely than not" affected the outcome of the trial. *Strickland*, 104 S.Ct. at 2068.

3. Effective representation hinges on adequate pretrial investigation, and therefore the right to competent counsel imposes a correlative duty on defense counsel to undertake reasonable steps in determining all avenues of defense. *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1221 (1985). Strategic choices made after less than complete investigation are reasonable only to the extent that professional judgments support the limitations on further investigation. *Strickland*, 104 S.Ct. at 2066. An informed tactical choice of trial strategy, however, is not reviewable on an ineffectiveness claim. *United States v. Dyer*, 786 F.2d 812, 816 (7th Cir. 1986).

4. Pursuant to the above, defense counsel should ordinarily interview not only his or her own witness, but also those that the state intends to call. *Crisp*, 743 F.2d at 584; *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

5. Although each allegedly incompetent act or omission must be examined individually, the cumulative effect of all errors must be examined in light of the totality of the circumstances, including the strength or weakness of the government's case. *Strickland*, 104 S.Ct. at 2069; *Crisp*, 743 F.2d at 583.

6. Petitioner has failed to show that his attorney acted unreasonably in deciding that petitioner's proferred alibi witnesses were unreliable and thereby declining to call them as witnesses. The chief alibi witness, Ms. Connors, struck this court as lacking credibility, and the moving records weaken rather than substantiate the alibi.

7. Petitioner has failed to show that counsel acted incompetently in not calling any of the doctors at Cook County Hospital to corroborate the alibi witnesses' story

that he was ill on July 9, 1977. The hospital records would have injected the issue of Harris's heroin use into the trial, which Musburger sensibly wished to avoid. Moreover, Musburger had already decided that the alibi was not credible, and therefore there was nothing to corroborate.

8. Petitioner has failed to show prejudice from counsel's alleged failure to interview or call as witnesses Investigators Peck and Sykes to impeach Slater as to where the victim was shot. The police records sustain Slater's testimony that Howard was shot on the sidewalk, and neither investigator was called at the evidentiary hearing to testify otherwise.

9. Petitioner has failed to show prejudice from counsel's failure to interview or call as a witness George Williams. Williams did not appear at the evidentiary hearing, his statements to the police are not exculpatory of petitioner, and it therefore remains speculative whether Williams' testimony would have helped the defense.

10. Petitioner has failed to show that counsel unprofessionally failed to interview or call Joann Hightie, or that he was thereby prejudiced. Given counsel's admission that he probably would not have subpoenaed Riles unless he thought she might be helpful, that would make it likely that Hightie was one of the women he spoke to on Christiana St. While the evidence is unclear, even if counsel did not interview Hightie, it is speculative whether her testimony would have helped the defense. Although Hightie had told the police saw two men running through a playlot, she also saw a Buick Electra similar to the car described by Slater. While Hightie "might" have testified at trial that the car was a different color, it is not reasonably certain she would have, and the discrepancy could be seen as a minor point.

11. Assuming that Musburger never interviewed Fowlkes (the evidence is unclear), petitioner has none-

theless failed to show prejudice from this omission. It appears from the circumstances that Fowlkes would have strengthened the government's case in that he described Howard's assailant as age 25-26, 5′10″ to 6′ tall, medium build, dark complexion, and medium afro hairstyle—terms which matched Slater's description and which fit petitioner. Fowlkes had also seen the assailant get into a Buick Electra parked alongside the scene, and was according to Betty Larry with McWhorter after the crime. Although Fowlkes testified to a different colored shirt and car than had Slater, these discrepancies might have been explained or been viewed as minor in light of the significant similarities. It is troubling that the police records indicate a search for Fowlkes without further mention, but this court never learned what further testimony from him would have produced. Petitioner has therefore not shown that Fowlkes' testimony was reasonably likely to help his defense so as to show prejudice from counsel's omission.

12. Petitioner has failed to show that trial counsel was ineffective in that the defense photographs of the crime scene were taken during the day after leaves had fallen from the trees. Trial counsel was able to use the photographs to instruct the jury on the important point that no streetlights would have directly illuminated where Howard was shot, and there is no indication on this record that night pictures would have materially aided that impeachment. This impeachment by photograph also cures any alleged ineffectiveness regarding counsel's failure to cross-examine Slater about the streetlights; the photographs provided a surer route to effective impeachment, and, contrary to petitioner's allegation #12, Slater's preliminary hearing testimony as to the presence of streetlights was not inconsistent with his trial testimony. While night pictures, if obtainable, might have been preferable, the benefit is speculative and counsel's oversight is in any event too minor to justify vacating Harris's conviction.

13. Petitioner has failed to show prejudice from counsel's failure to investigate the existence of a poolroom at 13th and Kedzie, since the testimony at this trial indicates that there is in fact a billiards parlor at that corner. While Slater referred at the preliminary hearing to the poolroom as a liquor store and not a poolroom, petitioner's counsel suggested at one point in this court that the billiards parlor in fact sells liquor. The court does not find counsel's failure to impeach Slater on this discrepancy a significant omission which would have been reasonably likely to help the defense.

14. Petitioner has failed to show ineffectiveness in counsel's failure to offer into evidence the agreed stipulation that would have perfected the impeachment of Slater's trial testimony regarding whether he turned onto Christiana from Douglas Street. Slater had originally told the police that he had turned onto Christiana from 16th Street, which meant he would have turned onto Christiana (a southbound street) south of where the shooting occurred. On cross-examination, Slater denied ever telling the police that he turned off of 16th street but admitted that his signed written statement said 16th Street. (Tr. 92). The parties worked out a stipulation that Officer Shine, if called to testify, would verify the accuracy of the signed statement as to what Slater had said. (Tr. 123-24, 128). The prosecutor agreed to treat the impeachment as perfected, however, and the stipulation was never introduced. (Tr. 130). Musburger testified that he didn't want to aggravate the jury by further corroborating Slater's admission to an inconsistent statement. (II. 27-28). The court finds this explanation questionable, since a stipulation is hardly aggravating. The court notes, however, that the inconsistency was argued to the jury, and the prosecution, pursuant to its agreement, never mentioned in closing argument Slater's denial of the inconsistency. The prejudice, if any, is too tenuous to support overturning petitioner's conviction.

15. Petitioner has not shown that counsel was ineffective for not impeaching Slater's testimony that he went to the police voluntarily. Under the McWhorter theory, which counsel had concluded was its best defense when trial began, having Slater voluntarily approach the police made it more likely that he was protecting someone. The failure to impeach Slater on this point by calling Officer Shine was neither unreasonable nor prejudicial, and possibly a tactical decision.

16. Petitioner has failed to show prejudice from counsel's failure to file a motion to disclose the identity of the informant. Musburger conceded at trial that this information could have been crucial had it provided a link between McWhorter and Slater, and the omission was not backed up by any professional judgment. Nonetheless, Musburger remembered no evidence of a McWhorter/Slater link, and petitioner has put forth no competent evidence at this hearing to show that McWhorter and Slater were in fact acquainted. It is therefore wholly speculative what such a motion would have revealed.

17. Petitioner has failed to show ineffectiveness in counsel's failure to interview Slater prior to trial. The need for such an interview was diminished in part by Musburger's ability to cross-examine Slater at the preliminary hearing, and any attempt at an interview was problematic given that Slater's car had been shot at in an apparent threat attempt, which may or may not have been linked to petitioner. It is speculative on this record whether a pretrial interview would have enhanced Musburger's ability to impeach Slater in a material way.

18. Petitioner has failed to show prejudice from counsel's failure to put Ronnie Harris or Jim Greer on the stand to testify that McWhorter and Slater had been seen together in Chicago's Central Park. (II. 38). Police reports indicate that Slater in fact lived on Central Park. (Ex. 48). Musburger could not recall why he did

not call these people to the stand. (I. 47-48). The state argues in its brief that these witnesses must have been among the witnesses whom Musburger thought were drug users. This is plausible, but Musburger's trial notes make reference to Ronnie Harris and the Central Park area, and the McWhorter defense, unlike the alibi defense, remained a viable theory at the time trial began. Thus it is doubtful whether or not the decision not to call Harris and Greer as witnesses was based on professional judgment. In any event, this court heard no testimony from either Greer or Ronnie Harris which would have enabled it to determine, as with Genise Connors, whether their testimony would have been credible, and therefore helpful to the defense.

19. Even if petitioner has shown ineffectiveness in connection with counsel's not putting Greer or Ronnie Harris on the stand, not taking proper photographs, and not interviewing Hightie, Fowlkes, and Slater, these claims were never made in the state post-conviction hearing and are therefore waived under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977).

20. Although the evidence is very close, petitioner has failed to show prejudice and ineffectiveness in counsel's decision not to call Alice Riles and Leroy Carter as witnesses at trial. It is more probable than not that these witnesses were consulted by counsel at trial, however briefly, and that counsel then made a strategy decision at the close of the state's case not to put them on the stand. This strategy puzzled the court greatly at the hearing, since Riles' and Carter's testimony might have raised doubt by suggesting that the men running from the scene were in fact the assailants, and Musburger's belief in a probable acquittal would not excuse putting on further helpful evidence.

Close examination of the police records, however, reveals that the McWhorter story was not as strong a de-

fense as Kuhlen's opening statement suggests. While Carter would have testified that he saw two men, one of whom was McWhorter, run from the area just after the shooting, Carter could offer no further exculpatory testimony, and Musburger knew of several witnesses—Clarence Gibson, Curtiss Fowlkes, Betty Larry—who would be called to corroborate Maurice Williams' testimony that McWhorter had in fact not left the scene. Actually putting on Riles and Carter as witnesses also raised the possibility that the prosecution would call McWhorter, whom Musburger knew was ready to finger his client.

Thus, the McWhorter defense was chiefly a viable theory for cross-examining the state witnesses, particularly if McWhorter took the stand, but does not appear to have been valuable as an actual defense. Kuhlen advised Judge Garippo that Carter and Riles might be called in rebuttal depending on the state's case, but Musburger remembered nothing substantive coming out of his continued witness interviews during trial. Moreover, the state weakened this defense by putting on only Slater as a substantive witness and eliciting from Maurice Williams that McWhorter had remained on the scene. Thus, the evidence suggests that Musburger's investigation led him to believe the defense would not have held up, and petitioner has put forth no evidence that the defense theory has merit as the true version of events. The court cannot conclude that trial counsel acted below a level of competence by raising the theory during opening argument but then abandoning the defense after further interviews and after the state had presented a perceptibly weak case.

21. The cumulative effect of all counsel's errors, while troublesome, does not make out a sixth amendment violation. Counsel was clearly remiss in not discussing his strategic decisions with petitioner. It is also probable from the record before this court that petitioner's counsel did not thoroughly investigate all witnesses named in the

police reports, but the benefit which might have accrued from further investigation (and thereby the reasonableness of Musburger's conduct) is murky at best. As the state notes in its post-trial brief, petitioner's version of the defense is still "no more than a version, even after an extended evidentiary hearing." Specifically, petitioner has not shown that further investigation would have strengthened rather than weakened the defense theory he claims his counsel unreasonably abandoned. Since the police reports are hearsay as to the truth of their contents, this court has insufficient evidence to find that further investigation would have benefitted petitioner. Petitioner has therefore failed to establish a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Conclusion

Accordingly, the court enters judgment for respondent, and *sua sponte* grants petitioner a certificate of probable cause for appeal. 28 U.S.C. § 2253. Appointed counsel are directed to advise petitioner of his right to appeal and the procedures for filing an appeal.

It is so ordered.

/s/ Susan Getzendanner
SUSAN GETZENDANNER
United States District Judge

May 30, 1986

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 86-2032

WARREN LEE HARRIS,
Petitioner-Appellant,

v.

MARVIN REED, *et al.*,
Respondents-Appellees.

Argued Feb. 9, 1987

Decided June 12, 1987

REHEARING AND REHEARING EN BANC

Denied July 20, 1987

Before BAUER, Chief Judge, CUDAHY, and POSNER, Circuit Judges.

BAUER, Chief Judge.

Warren Lee Harris was convicted of murder in 1977 and received an indeterminate sentence of 50-100 years in prison. His conviction was upheld on appeal against a challenge to the sufficiency of the evidence. Harris filed both state and federal petitions for post-conviction relief. In his state petition for post-conviction relief, Harris alleged ineffective assistance of trial counsel. This

issue had not been raised on direct appeal. Harris' state petition for post-conviction relief was denied. The Illinois Appellate Court affirmed the dismissal of Harris' petition, although it is unclear whether the dismissal was based on waiver or the weakness of Harris' claim on the merits.

In his federal petition for a writ of habeas corpus in the United States District Court, Harris again claimed ineffective assistance of trial counsel. Although the state urged that Harris' failure to present the claim on direct appeal precluded the federal court from addressing the claim, the court found that the state appellate court had excused the procedural default by addressing the merits in denying Harris' petition for post-conviction relief. *United States ex rel. Harris v. Reed*, 608 F.Supp. 1369 (N.D.Ill.1985). The district court then dismissed Harris' claim on its merits. We affirm the dismissal of Harris' petition without reaching its merits, since we conclude that the state court did not excuse the procedural default at issue.

I.

Harris was convicted of shooting Ernest "Pete" Howard on the west side of Chicago in 1977. Howard died before identifying his assailants. Harris was connected to the crime by the testimony of Antonio Slater who was driving down the block near the site of the murder. Slater testified that he heard a shot, saw Harris jump into a car and drive away past him. At trial, Harris was represented by Assistant Public Defenders Todd Musberger and Kathryn Kuhlen. In the opening statement, the defense promised to show that two witnesses had identified a man named McWhorter leaving the scene of the crime. In fact, Alice Riles and LeRoy Carter had given statements to that effect to the police and were present, in the courtroom, prepared to testify for the defense. In the end, however, the defense presented no witnesses, resting on the belief that the state had

not proven its case against Harris beyond a reasonable doubt.

Harris did not claim ineffective assistance of counsel in his direct appeal.[1] In denying the petition for post-conviction relief, the state court noted that an issue is waived for purposes of post-conviction relief if it could have been raised on direct appeal. Typically, a claim of ineffective assistance of counsel cannot be raised on direct appeal because its resolution often requires evidence which is not contained in the record on appeal. Here, however, the state court found that all of the grounds presented to support the claim of ineffective assistance of counsel were sufficiently supported by the record to have been raised on direct appeal—with the exception of the ground alleging counsels' failure to investigate and present alibi witnesses. After noting this, the court proceeded to reach and reject some of Harris' claims on the merits—claims which he could have raised on direct appeal. The United States District Court held a three-day hearing to examine Harris' claim of ineffective assistance of counsel in his petition for habeas corpus relief and determined that Harris' claim should be rejected on its merits.

II.

The state urges us to find that the district court erred in ruling that Harris had not waived his right to present his claim of ineffective assistance of trial counsel by failing to raise the issue on direct appeal. Failure to raise an issue that could have been raised on direct appeal waives the issue for the purposes of post-conviction review. *People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist.1979). An issue which precludes a state appellate court from addressing the

[1] It appears that Harris was represented on appeal by counsel from the State Appellate Defenders Office and was no longer represented by Assistant Public Defenders, thus making it more difficult to show cause for the failure to raise the issue on direct appeal.

merits of a claim, also precludes a federal court, on a habeas corpus petition, from addressing the merits of the claim. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir.1983). If, however, the state court ignores the procedural default and addresses the claim on its merits, a federal court is not precluded from reaching the merits of the claim in a petition for habeas corpus relief. *United States ex rel. Williams v. Franzen*, 687 F.2d 944 (7th Cir. 1982).

As here, the defendant in *Williams* failed to present a claim on direct appeal, first asserting it in a state petition for post-conviction relief. Without addressing waiver, the state court reached the merits of Williams' claim. On habeas review, the district court noted:

> The policies underlying deference to a state procedural default are inapplicable where the state itself does not apply or enforce the rule. When a state court does not rely on a waiver of a constitutional claim, but goes beyond the alleged waiver to rule on the merits, a federal court can also reach the merits of the claim without the cause-prejudice standard of *Wainwright v. Sykes* being met.

Id. at 951. Thus, a state court's complete failure to note waiver allows a federal court to review the merits of a claim. In *Farmer v. Prast*, 721 F.2d 602 (7th Cir. 1983), we addressed the effect of a state court decision which relied both on a procedural default and on the weakness of the appellant's claim on the merits. There we determined that when a state court relies both on waiver and a rejection of the claim on the merits—a federal court will respect the alternate *res judicata* ground of the order and will be precluded from reaching the merits of the claim. *See also Phillips v. Lane*, 787 F.2d 208, 211 (7th Cir.1986).

The state appellate court order at issue here is distinguishable from the orders in both *Williams* and *Farmer*. In *Williams*, the court completely ignored waiver, while in *Farmer*, the court expressly relied, in part, on waiver. The state court here did neither. In examining Harris' post-conviction petition, the state court noted that failure to present an issue on direct appeal precludes post-conviction review unless the nature of the issue is such that it could not have been raised on direct appeal. The district court then examined the trial court record and found that all grounds, save that relating to the alibi witnesses, could have been presented on direct appeal. Without expressly finding that all other grounds were waived, the court then proceeded to a short discussion of general standards for judging a claim of ineffective counsel. Next, the court analyzed both trial counsel's failure to call alibi witnesses, as well as other grounds that could have been raised on direct appeal and concluded that Harris had received the effective assistance of his trial counsel.

The district court found the state court order analogous to that in *People v. Ross*, 63 Ill.App.3d 884 20 Ill.Dec. 688, 330 N.E.2d 897 (1st Dist. 1978), in which the Illinois Appellate Court noted a waiver problem but decided to examine the case on its merits. In *Ross*, however, the court explicitly stated its determination to ignore the procedural default. Here, we have no such clear expression of intent. There is neither an explicit finding of waiver nor an expression of an intention to ignore waiver. The order is ambiguous because the court addressed the merits of some of the petitioner's claims which it clearly implied had been waived.

While wo do not require an explicit finding of waiver nor an explicit statement of intention to ignore waiver, it is clearly more helpful to include such language. In considering whether a state court chose to condone a procedural default, a reviewing court should try to as-

sess the state court's intention to the extent that this is possible. Upon review of the state court order, we find we must disagree with the district court in this regard. A full reading of the order suggests to us that the appellate court intended to find all grounds waived except that pertaining to the alibi witnesses. The court then proceeded, as an alternate holding, to reject Harris' claim on its merits. Under these circumstances, we find that the order was closer to that in *Farmer*, where the state court relied on alternate grounds for its finding. We cannot find that the state court intended to ignore the procedural default. Accordingly, we are precluded from reviewing the argument raised in the petition, and the order dismissing the habeas corpus petition is

AFFIRMED.

CUDAHY, Circuit Judge, concurring:

I write separately only to indicate my view that the ineffective assistance of counsel claim should not be treated as waived. As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived. The Illinois court considered the claim on its merits. Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the state court's power to protect their procedural requirements merely by making express findings that a petitioner has waived.

Judge Getzendanner struggled with the important and difficult issues here and, after a hearing lasting three days, denied the petition. Although the matter is very close, I would support her determination and thereby reach the same result as the majority but by a different route.

SUPREME COURT OF THE UNITED STATES

No. 87-5677

WARREN LEE HARRIS,
Petitioner

v.

MARVIN REED, Warden, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

March 7, 1988

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,

Petitioner,

v.

MARVIN REED, Warden and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, should that ambiguity be resolved in favor of affording habeas review of the constitutional claim?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, holding that the Illinois Appellate Court probably intended to find a waiver of the Petitioner's ineffective assistance of counsel constitutional claim, is reported at *Harris* v. *Reed*, 822 F.2d 684 (7th Cir. 1987). (Joint Appendix ("J.A.") at 68.) The contrary holding of the District Court that the state court did not base its decision on a finding that the ineffective assistance claim had been waived is reported at *Harris* v. *Reed*, 608 F. Supp. 1369 (N.D. Ill. 1985). (J.A. at 15.) The opinion of the District Court finding that Petitioner was not denied effective assistance of counsel is unpublished and is found in the Joint Appendix at 45.

The order of the Illinois Appellate Court affirming the denial of Petitioner's state court post-conviction relief is unpublished and is found in the Joint Appendix at 9. The order of the Illinois Appellate Court affirming Petitioner's conviction on direct appeal is unpublished and is found in the Joint Appendix at 5.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 2101(c). Petitioner seeks review of the June 12, 1987 decision of The United States Court of Appeals for the Seventh Circuit. A Petition for Rehearing with Suggestion for Rehearing on *en banc* was filed on June 26, 1987 and denied on July 20, 1987. A Petition for Writ of Certiorari was filed on October 16, 1987. On March 7, 1988, the Court granted the Petition as to Question 1. *Harris* v. *Reed*, ___ U.S. ___, 108 S.Ct. 1107(1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI to the United States Constitution:

> In all criminal prosecutions an accused shall enjoy the right to a speedy public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel for his defense*. (Emphasis added).

Section 2254(a) of title 28 of the United States Code:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Trial of Warren Harris In December 1977, Petitioner was tried for murder in the Circuit Court of Cook County, Illinois. A public defender assigned to represent Petitioner told the jury in opening statement that the evidence would show that two witnesses saw another man, Melvin McWhorter, flee from the scene of the crime and that these two persons separately identified Melvin McWhorter in a police lineup as the person they saw running away from the night-time shooting. (J.A. at 3.) The trial record shows that these two witnesses were present in the courtroom. (Petitioner's Habeas Exh. 1 (Trial Transcript), p. 23.)

After the trial court denied Petitioner's motion for directed verdict, the public defender rested Petitioner's case without presenting any witnesses, including the two who separately identified McWhorter, and offered no evidence supporting the theory proclaimed in the opening statement. (Petitioner's Habeas Exh. 1, pp. 126, 130.)

Defense counsel also failed to offer into evidence a stipulation that materially impeached the prosecution's sole eyewitness who testified that, while driving his car near the scene of the shooting, he caught a fleeting glimpse of Petitioner, whom the witness had seen only once before approximately two years before the trial. (Petitioner's Habeas Exh. 1, pp. 122-24, 130.) The entire trial, from opening statements to closing argument, comprises only 130 pages of double-spaced transcript. (Petitioner's Habeas Exhibit 1, pp. 25-154.) Petitioner was convicted of murder and later sentenced to 50 to 100 years in prison.

Post-Conviction Review in the State Courts. Petitioner's conviction was upheld on direct appeal against a challenge to the sufficiency of the evidence. (J.A. at 5.) Petitioner then filed a Petition for Post-Conviction Relief in the Circuit Court of Cook County alleging ineffective assistance of trial counsel. He had not raised this issue on direct appeal. The state trial court denied this Post-Conviction Relief on the merits, stating:

> . . . I have considered all aspects, I have heard your arguments, I have heard the arguments of the state, and it is the opinion of the court that the defendant had been properly represented, that he had been given proper consideration on his appeal, both by the appellate court and the supreme court, and accordingly, this court is hereby denying your petition, and it is hereby dismissed.

(Report of March 19, 1981 Proceedings, Circuit Court of Cook County, reported in *Harris* v. *Reed*, 608 F. Supp. 1369, 1376 (N.D. Ill. 1985); J.A. at 26-27.)

On appeal, the Illinois Appellate Court affirmed in an unpublished order.[1] (J.A. at 9.) This order first notes that

[1] This order was issued pursuant to Illinois Supreme Court Rule 23

(Footnote continued on next page)

Petitioner failed to raise his ineffective assistance claim on direct appeal and then, without making any finding of waiver, proceeds to discuss and resolve the case on the merits of the ineffective assistance claim. (J.A. at 12-14.)

Federal Habeas Review. Petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois claiming he had been denied effective assistance of counsel. The State moved to dismiss, arguing that Petitioner had waived that claim by failing to urge it on direct appeal. The District Court, however, found that the Illinois Appellate Court had excused Petitioner's procedural default by addressing the merits of his ineffective assistance claim. *Harris* v. *Reed*, 608 F. Supp. 1369, 1376-78 (N.D. Ill. 1985). (J.A. at 30.) The District Court then set the matter for trial on the merits of Petitioner's claim and appointed one of the undersigned to represent him. Trial was held in November, 1985. The District Court found that the case was "very close," but denied Petitioner's claim. (J.A. at 65.)

On appeal to the United States Court of Appeals for the Seventh Circuit, the State again argued, as a threshold matter, that the District Court erred in finding the state court waived Harris' procedural default. The majority of the panel agreed after first observing that the state court order is ambiguous:

(Footnote continued from previous page)
(Ill. Rev. Stat. ch. 110A, § 23 (1981)) which states that a case shall be disposed of by an "opinion" only when the panel deciding the case determines that it (1) involves a new legal issue, (2) involves a conflict between appellate courts, (3) is of substantial public interest, or (4) contributes significantly to legal literature. All other cases are to be disposed of by an unpublished order.

> Here, we have no such clear expression of intent. There is neither an explicit finding of waiver nor an express intention to ignore waiver. The order is ambiguous because the Court addressed the merits of some of the Petitioner's claims which it clearly implied had been waived.

822 F.2d at 687. (J.A. at 72.) The majority then stated that it "should try to assess the state court's intention to the extent this is possible." *Id.* at 687. (J.A. at 72-73). The majority concluded that a "full reading of the order suggests to us that the Appellate Court intended to find all grounds waived except that pertaining to alibi witnesses." *Id.* at 687. (J.A. at 73.) Accordingly, the majority held it could not review the merits of Harris' ineffective assistance claim.

In a concurring opinion, Judge Cudahy disagreed with the majority's attempt to divine the unspoken intent of the Illinois Appellate Court. Judge Cudahy argued in favor of a presumption that a waiver not clearly found has been condoned by the state court. *Id.* at 687. (J.A. at 73.) As for the merits of Harris' ineffective assistance claim, Judge Cudahy found that "[a]lthough the matter is very close," he agreed with the District Court. *Id.*

SUMMARY OF ARGUMENT

Although federal courts are empowered to review state court criminal convictions for violations of federal constitutional rights, such review is not without limits. When a state court decision rests on adequate and independent state grounds, federal courts must respect that determination absent a showing of cause and prejudice by the petitioner. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Difficulty arises when, as here, the state court decision is unclear whether it rests on adequate and independent

state grounds. Lower federal courts have addressed the problem of ambiguous state court decisions in the context of federal habeas review, but this Court has not yet done so. The Court, however, has addressed the problem in the context of a direct appeal. In *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), the Court held that, absent a "plain statement" in the state court opinion that it relied on an adequate and independent state ground, the Court would presume in favor of preserving the federal claim for direct review.

The *Michigan* v. *Long* approach has been used by some lower federal courts in habeas cases. Other lower courts have used conflicting approaches.[2] Some guess at what the state court intended. The Court of Appeals below, for example, observed that the state court order was "ambiguous" and felt compelled to surmise what the order "suggested."

The question in this case narrows to: should the "plain statement" rule of *Michigan* v. *Long*, a direct appeal case, apply to habeas cases? Because habeas review is broader than direct review, we respectfully suggest that *a fortiori* the *Long* rule applies.

Other approaches, to the extent that they have been used by the lower courts, do not promote comity, accuracy, or uniformity in interpreting federal constitutional law. The approach that most respects the interests of comity and the writ of habeas corpus is the *Michigan* v. *Long* plain statement rule.

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[2] *See, e.g., Meadows* v. *Holland*, 831 F.2d 495 (4th Cir. 1987) (*en banc*), pending before the Court on petition for certiorari, No. 87-6063.

We are not suggesting that the plain statement rule be changed. We suggest only that the rule embodies substantive constitutional law that should be followed whether the form of federal review be direct appeal or habeas.

ARGUMENT

I. ABSENT A PLAIN STATEMENT BY A STATE COURT THAT ITS DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND, FEDERAL COURTS SHOULD AFFORD HABEAS REVIEW OF FEDERAL CLAIMS.

Federal habeas review of state court convictions under 28 U.S.C. § 2254(a) is both a great protector of individual liberty and a source of friction in the smooth operation of our dual system of federal and state courts.[3] By its very nature, the remedy involves federal interference with state court decisions to ensure uniform application of

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[3] The writ of habeas corpus has been a protector of individual liberty for centuries. Yackle, *Postconviction Remedies*, § 4, pp. 7-15 (1981). When the nation was founded, the writ was held in such high regard that its continued existence was mandated in the Constitution itself—even before the Bill of Rights was drafted. Constitution, Article I, § 9; *The Federalist Papers*, No. 84 (Hamilton) (New American Library Edition, 1961).

The Judiciary Act of 1789 authorized federal courts to issue the writ, but limited its use to federal convictions. *See Stone* v. *Powell*, 428 U.S. 465, 474-75 (1976) (history of writ recounted). In 1867, after the Civil War, Congress enacted legislation that allowed federal courts to review state court convictions. *Id.* at 475. This legislation was the predecessor of 28 U.S.C. § 2254(a), which presently provides that federal courts shall:

> [E]ntertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

federal law and freedom from unconstitutional restraint. The judicial task of balancing important considerations of comity, uniformity, and individual liberties has been fraught with difficulties and uneven results.

To avoid unnecessary interference with state court judgments, the rule has developed in 28 U.S.C. § 2254(a) cases that federal courts ordinarily should not grant habeas review if the state decision upholding the petitioner's conviction rests on adequate and independent state grounds. *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). The Court adopted this doctrine of adequate and independent state grounds from the jurisprudence of Supreme Court appellate jurisdiction. In direct appeal cases, the Court long has held that it has no jurisdiction to review directly the decision of a state's highest court if the decision rests on adequate and independent state grounds. *See Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983); *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1965); *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945).[4] A procedural default, such as failure to make a timely objection at trial or to raise an issue on appeal, ordinarily constitutes an adequate and independent state ground that, if relied upon by the state court, will bar federal review of the state court decision even if it discusses federal issues.

Although the doctrine of independent and adequate state grounds creates a jurisdictional bar in direct review

[4] Justice Jackson explained in *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945), that the doctrine is premised on the belief that the Supreme Court should not issue advisory opinions that merely correct the state court's view of federal law but, because of independent state grounds, do not alter the judgment. Others have argued that the rationale for the doctrine is that the federal question is mooted by the existence of a state ground which will support the judgment. Nowak, Rotunda and Young, *Constitutional Law* 95 (2nd ed. 1983).

cases, the Court never has held that the doctrine limits the power of federal courts to provide habeas corpus relief. In *Fay* v. *Noia*, 372 U.S. 391, 426-35 (1963), the Court recognized that federal court jurisdiction to provide habeas relief is much broader than its jurisdiction to review state court decisions on appeal. Tracing the origins of the doctrine of independent and adequate state grounds to the Judiciary Act of 1789, which imposed limitations on the Court's appellate jurisdiction, the Court held that doctrine did not limit the power of federal courts to afford habeas relief. 372 U.S. at 398-99.

Although the doctrine does not create a jurisdictional bar in habeas cases, it does embody important comity considerations that limit the discretion of federal courts to provide habeas relief in some instances. In *Fay* v. *Noia*, the Court held that comity considerations preclude a federal court from affording habeas review of state convictions when the petitioner deliberately by-passes state procedures or remedies.

Fourteen years later, the Court substantially expanded the circumstances under which the doctrine of independent and adequate state grounds ordinarily will preclude federal habeas review. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the habeas petitioner failed to object at trial to the admissibility of his out-of-court confession. The Court, abandoning the "deliberate by-pass" rule, held that the petitioner's failure to comply with the state law contemporaneous objection rule was an adequate and independent state ground that barred federal review unless "cause and prejudice" could be established for the procedural default. 433 U.S. at 87. The Court found that the cause and prejudice standard would encourage the state court trial to be the "main event," promote greater

respect for state court opinions, and further the interests of "finality" in criminal adjudications. *Id.* at 88-90.

Although *Sykes* abandoned *Noia's* "deliberate by-pass" rule, it left intact *Noia's* holding that federal courts have the power to review state court decisions regardless of any adequate and independent state ground. *See Sykes*, 433 at 83, 87-88. Later decisions by the Court have reiterated this principle. *Reed* v. *Ross*, 468 U.S. 1, 9 (1984) (federal courts empowered under 28 U.S.C. § 2254 to look beyond state procedural forfeiture and consider constitutional claim). Therefore, when a federal court declines habeas review, whether under the earlier deliberate by-pass rule or under the current "cause and prejudice" test, it does so not because it lacks jurisdiction, but for policy reasons designed to promote federal-state comity and finality.

Later decisions have expanded application of *Sykes'* "cause and prejudice" rule to procedural defaults involving the determination of "guilt or innocence," *Engle* v. *Issac*, 456 U.S. 107, 129 (1982), and to defaults on appeal. *Murray* v. *Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2648 (1986); *Smith* v. *Murray*, 477 U.S. 527, 106 S.Ct. 2661, 2665-66 (1986). In each of these cases, the state courts never had an opportunity to address petitioner's federal claim because of his procedural default.

The situation is quite different when the state court addresses and resolves the merits of a petitioner's federal claim notwithstanding a prior procedural default. This situation can arise when, as here, the petitioner fails to raise the federal issue in his direct state court appeal but does raise it in a subsequent state post-conviction petition. The situation also can arise when the petitioner defaults by not raising the issue on a timely basis at trial

but does raise it on appeal. In these situations, where the state court addresses the petitioner's federal claim notwithstanding a procedural default, the state court necessarily determines that the policies underpinning its procedural rule are unworthy of vindication under the particular circumstances of the case. *Cooper* v. *Wainwright*, 807 F.2d 881, 886 (11th Cir. 1986), *reh'g denied*, 811 F.2d 612 (11th Cir. 1987), *cert. denied sub nom.*, *Dugger* v. *Cooper*, ___ U.S. ___, 107 S.Ct. 2183 (1987).

Federal courts respect this determination and serve the comity encouraged by *Sykes* and its progeny by affording habeas review of the state court's decision on the merits of the petitioner's federal claim. As stated in *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 154 (1979):

> If neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some procedural rule, a federal court implies no disrespect for the state by entertaining the claim.

In *Ulster County*, the Court allowed federal habeas review of a petitioner's federal constitutional claim because, even though "the state courts were less than explicit in their reasons" for affirming petitioner's convictions, it was apparent that the convictions had been affirmed on the merits of the constitutional claim and not on the basis of the procedural default. 442 U.S. at 148-49. *See also Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967) (where state appellate court reached the merits of search and seizure issue even though not raised at trial, then federal claim could be considered on habeas review).

The difficulty arises when it is not clear whether the state court relied on the merits, the procedural default, or both. Before this case, the Court has not had the opportunity to resolve the difficulty presented by ambiguous

state court opinions in the context of a federal habeas corpus case. The lower courts, however, have struggled with this problem. Several approaches have emerged.

Under the first approach, the federal court presumes a state court decision is based on a state law procedural default rather than the merits when faced with an unclear opinion or summary affirmance if the prosecution has argued a procedural default. This is the approach used by the courts in *Martinez* v. *Harris*, 675 F.2d 51, 54 (2nd Cir. 1982), *cert. denied*, 459 U.S. 849 (1982); *Raper* v. *Mintzes*, 706 F.2d 161, 174 (6th Cir. 1983) and *Shepard* v. *Foltz*, 771 F.2d 962, 965 (6th Cir. 1985).

The second approach involves the federal court attempting to interpret the state court opinion. Federal courts have inquired whether the state court reached "the gist of the federal constitutional question" (*Puleio* v. *Vose*, 830 F.2d 1197, 1200 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 56 U.S.L.W. 3683, (1988)), whether the state procedural default was a "substantial basis" for the state court decision (*Hockenbury* v. *Sowders*, 620 F.2d 111, 115 (6th Cir. 1980), *reh'g denied*, 633 F.2d 443 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981)), or whether the state court probably intended to rely on a procedural default. *Harris* v. *Reed*, 822 F.2d 684, 687 (7th Cir. 1987).

Under the third approach, the federal court decides the merits of the federal claim unless the state court relied exclusively on the procedural default. If the state court bases its decision on both procedural default and the merits, the federal court reviews the merits. *Braiser* v. *Douglas*, 815 F.2d 64, 65 (10th Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3271 (1987); *Rogers* v. *McMullen*, 623 F.2d 1185, 1188 (11th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *Thompson* v. *Estelle*, 642

F.2d 996, 998 (5th Cir. 1981). *See also*, Wilkes, *Federal and State Postconviction Remedies and Relief*, § 8-24, p. 199 (2nd ed. 1987).

A fourth approach, which we advocate, advances the *Sykes* comity considerations, promotes uniformity of federal law, and preserves the vitality of "the Great Writ."[5] Under this approach, the federal court invokes the *Sykes* "cause and prejudice" test only if the state court decision contains a plain statement that it rests on an adequate and independent state ground. Absent such a plain statement, the federal court provides habeas review without invoking the *Sykes* "cause and prejudice" test. In other words, when a state court decision is not clear that it rests on an adequate and independent state ground, the federal court presumes that the decision rests on the merits. *Meadows* v. *Holland*, 831 F.2d 493, 504, 507 (4th Cir. 1983) (*en banc)* (dissenting opinion of Judges Winter and Phillips); *Harris* v. *Reed*, 822 F.2d 684, 687 (Cudahy, J., concurring) (should invoke a presumption that waiver not clearly found had been condoned); *Mann* v. *Dugger*, 817 F.2d 1471 (11th Cir. 1987) *vacated for rehearing en banc*, 828 F.2d 1498 (11th Cir. 1987) (Clark, J., specially concurring) (should adopt plain statement rule in habeas cases); *Henry* v. *Wainwright*, 686 F.2d 311, 314, 314 n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983) (where state procedural default not clear, state court presumed to have reached merits).

This fourth approach effectively adopts the "plain statement" rule set forth in *Michigan* v. *Long*, 463 U.S. 1032

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[5] *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95, 2 L.Ed. 554 (1807) (per Marshall, C.J.). *See also Smith* v. *Bennett*, 365 U.S. 708, 712 (1961) (per Clark, J.) (habeas corpus is "the common law world's 'freedom writ'").

(1983), where the Court addressed an ambiguous state court opinion in the context of deciding whether jurisdiction existed to review a decision of the Supreme Court of Michigan, which had reversed a conviction for possession of marijuana on the ground that the police search of the defendant's automobile violated the Untied States Constitution. In its decision, the Supreme Court of Michigan also discussed an adequate and independent state ground for reversing the conviction. On appeal to the United States Supreme Court by the State of Michigan, the defendant argued that the Court lacked jurisdiction to consider the federal constitutional issues because an adequate and independent state ground supported the Michigan Supreme Court's decision. 463 U.S. at 1037-38.

This Court began its analysis in *Long* by stating that it is "incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Id.* at 1038 [quoting *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931)]. The Court added that:

> Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.

Id. The Court then identified three methods it had used in the past to deal with unclear state court decisions: (1) outright dismissal; (2) vacation and remand to the state court for clarification; and (3) federal court re-examination of state law. The Court concluded that none of the approaches were satisfactory. Re-examining state law was unsatisfactory because it requires a federal court to interpret state law with which it may not be familiar and

which may not have been briefed adequately by the parties. *Id.* at 1039. Vacation and remand for clarification was unsatisfactory because it fostered delay and inefficiency and placed additional burdens on state courts. *Id.* at 1042. Finally, outright dismissal was contrary to the need to develop uniformity in federal law. *Id.*

In place of these three *ad hoc* approaches, this Court set forth a uniform principle:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal procedents as it would on the precedents of all other jurisdictions, *then it need only make clear by a plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not compel the result that the court has reached.
>
> * * *
>
> We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this court of the validity under the federal constitution of state action.*"

463 U.S. at 1041-42 [quoting *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940)] (emphasis added). The

Court concluded that it should review the federal constitutional issue because there was no plain statement that the state court decision rested on adequate and independent state grounds. *Id.* at 1044.

After *Long*, the Court applied the plain statement rule in deciding whether a procedural default on direct appeal constituted an adequate and independent state ground. *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). The rule now exists in direct appeal cases that, absent a plain statement by the state court that its decision rests on adequate state substantive law (as in *Long)* or adequate state procedural law (as in *Caldwell),* the Court will review the federal issue.

The policy considerations that prompted adoption of the plain statement rule in direct appeal cases apply with equal or greater force in habeas cases. The need for uniformity in federal constitutional law is no less compelling in cases that may reach the federal courts by way of habeas rather than direct review. The policy considerations articulated in *Sykes* also are well served by applying the plain statement rule to habeas cases. The other approaches, to the extent they involve second-guessing what a state court meant or presuming in favor of waiver, hardly promote comity, finality, or accuracy. Instead, these approaches involve intrusive, and possibly inaccurate, interpretations of state court decisions that invariably lead to further litigation.

Any approach that involves second-guessing of state court decisions or presuming in favor of waiver not only disserves the *Sykes* policy considerations but also seriously impairs the rights of habeas petitioners. Although *Sykes* restricted *Noia's* more liberal allowance of the Great Writ, the Writ remains a fundamental right to

freedom that should not be left to the mercy of ambiguous state court rulings.

When ambiguity exists as to whether a state court opinion rests on adequate and independent grounds, it should be resolved in favor of preserving federal review of the federal constitutional claim. This presumption in favor of federal review follows from the right of a habeas petitioner to have his federal constitutional rights adjudicated by a federal court even if passed upon by a state court. *See Brown* v. *Allen*, 344 U.S. 443, 458 (1953) (state adjudication of federal right not *res judicata* in federal habeas review). Such a presumption also makes sense in light of the strong policy that federal rights should not be lost to unclear state decisions. (*See Long*, at 1041.)

Moreover, the state court, not the habeas petitioner, controls the content of its decision. State judges have the right and duty to uphold federal law; they know that federal habeas review exists. If a state court desires to base its decision on a state law procedural forfeiture and thereby foreclose federal habeas review, it may do so simply by including a plain statement to that effect. The risk that an ambiguous state court decision may be reviewed by a federal court should be placed on the state court that created the ambiguity, and not on the hapless defendant.

The burden on state courts of following the plain statement rule is minimal. That burden already exists in direct review cases. State courts know that to foreclose direct review by this Court they must include in their decisions a plain statement that the judgment rests on adequate and independent state grounds. It is no more intrusive to require such a plain statement in habeas cases. Indeed, it is far more intrusive when federal courts undertake to

interpret state law or speculate as to the intent of ambiguous state court decisions. Comity considerations are disserved when the federal court, as a result of incorrectly guessing the basis for a state court's decision, fails to respect a state court's determination that the polices underpinning its procedural rules are unworthy of vindication under the particular circumstances of the case. Thus, the benefits of applying *Long's* plain statement rule to habeas cases far outweigh any arguable detriment to our dual court system.

Furthermore, what difference does it make to the proper working of our dual court system whether an ambiguous state decision is brought into the federal courts by direct appeal to the Supreme Court or by a habeas petition to a federal district court? Should not the ambiguous state decision be subject to the same rules of interpretation or deference in either case? Should not the United States Constitution and the states' right of self-government be given equal respect regardless of the method of federal review? We respectfully suggest that *Long's* plain statement rule should apply in both habeas and direct review cases.

Many judges and commentators agree. Judge Cudahy, though he does not mention *Long* by name, articulated in his concurring opinion below the basic proposition that we urge here:

> As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived. The Illinois court considered the claim on its merits. *Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned.* Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult,

> very important and very close issues on the merits. *Certainly it is within the state courts' power to protect their procedural requirements merely by making express findings that a petitioner has waived.*

Harris v. *Reed*, 822 F.2d at 687 (emphasis added). (J.A. at 73.)

Similarly, in *Henry* v. *Wainwright*, 686 F.2d 311 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), the Fifth Circuit stated:

> In the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by untimely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits.
>
> Otherwise, federal habeas review would unjustly be denied a prisoner who had no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying *Sykes* and *Isaac* for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

686 F.2d at 314 and n.4. *See also Meadows* v. *Holland*, 831 F.2d 493, 504, 507 (4th Cir. 1987) (*en banc)* (dissenting opinions of Judges Winters and Philips) (rule barring habeas relief due to procedural default available only where clear from plain statement, citing *Long); Mann* v. *Dugger*, 817 F.2d 1471 (11th Cir. 1987) *vacated for rehearing en banc*, 828 F.2d 1498 (11th Cir. 1987) (Clark, J., specially concurring) (applying *Long's* plain statement rule to habeas cases is not unduly burdensome).

Commentators also support application of *Long* to habeas cases as the best method of balancing the policy

interests of *Sykes* with the rights of the state prisoner. Professor Yackle of Boston University School of Law recommends application of *Long's* plain statement rule in federal habeas cases where the state decision is unclear whether it rests on a procedural default:

> By demanding that [state] courts articulate any procedural ground upon which they wish to rest judgment, the federal courts ensure that the prisoner's federal interests are subordinated to the state interests that *Sykes* identified. Federal claims are cut off for the reasons the Supreme Court has found sufficient and not merely because a busy state court failed to reveal its true intentions.

Yackle, *Postconviction Remedies*, § 84, p. 150-51 (Cum. Supp. 1988); *see also*, Note, "Applying *Wainwright* v. *Sykes* to State Alternative Holdings and Summary Affirmances," 53 *Fordham L. Rev.* 1357, 1374-81 (1985) (*Long* should apply to unclear holdings). (Article attached as Exhibit A to Petitioner's Reply Brief in Support of Petition for Certiorari.)

In sum, *Long* provides a simple, workable rule for habeas cases where the basis for state court decisions is unclear or unknown. The alternative is an *ad hoc* approach where federal courts are placed in the difficult position of reviewing state court pleadings and arguments of counsel, interpreting obscure state court decisions, and second-guessing the intent of state court judges. This *ad hoc* approach only adds greater uncertainty and spawns further appeals. It also undermines the *Skyes* policy interests and the vitality of the writ of habeas corpus. Subjecting the Great Writ to the risk of error inherent in the Court of Appeals approach below is incompatible with the high respect afforded the Great Writ by this Court throughout history.

II. THE STATE COURT OPINION BELOW LACKS A PLAIN STATEMENT THAT IT IS BASED ON A PROCEDURAL DEFAULT AND THEREFORE THE MERITS ON THE FEDERAL CONSTITUTION QUESTION SHOULD BE REACHED.

The unpublished state appellate court order in this case discusses both a procedural default and the merits of Petitioner's constitutional claim. (J.A. 9.) In regard to Petitioner's constitutional claim, the order states: "[T]hese matters could have been raised in defendant's direct appeal." (J.A. at 12.) The order next remarks that trial and appellate counsel were different, but then drops any discussion of waiver altogether and never mentions it again, even if the final paragraph which affirms based on the merits of Petitioner's constitutional claim. (J.A. at 12-14.) The order clearly lacks a plain statement that it rests on Petitioner's procedural default.

The District Court below observed that the state appellate court never made an express finding that its affirmance was based on a procedural default. Because the appellate court apparently had excused the procedural default, the District Court held that the merits of Petitioner's constitutional claim should be reviewed. *Harris* v. *Reed*, 608 F. Supp. 1369, 1378 (N.D. Ill. 1985).

On appeal to the Seventh Circuit, the majority also observed that the state court never expressly found that Petitioner wavied his constitutional claim because of the procedural default. *Id.* at 687. Noting that the order is ambiguous because it addresses claims that might have been waived, the majority attempted to divine what the state probably intended. *Id.* Ultimately, however, the majority could do no more than state what the order "suggested." *Id.*

Interpreting ambiguity is risky when a petitioner's last chance to assert a constitutional right is at stake. Here,

the District Court interpreted the ambiguous order one way; the majority on appeal interpreted it another way. Petitioner's case provides a palpable example of the problems inherent in allowing federal courts free rein to search inscrutable state court decisions for adequate and independent state grounds. The plain statement rule of *Long* avoids these problems. The rule should be extended to habeas cases and applied here to reverse the decision of the Court of Appeals below.

Petitioner recognizes that the merits of his ineffective assistance claim are not before this Court. Yet it should be mentioned that Petitioner has maintained his innocence from the outset. When his trial counsel never produced the two witnesses promised in opening statement, the jury was left with the impression that something was terribly wrong with this defense. The jury virtually was invited to convict. Later, his public appellate counsel never raised ineffective assistance of counsel on direct appeal.[6] These facts raise a substantial question whether Petitioner's conviction rests on a trial that falls below minimal constitutional standards. Constitutional errors of such gravity should not be lost for federal review in the ambiguity of an unpublished state court order. Here, the

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[6] Petitioner never had a hearing or any other opportunity to show "cause and prejudice" for his procedural default. The District Court found that his procedural default had been excused by the state court, and thus held a hearing only on the merits of Petitioner's ineffective assistance of counsel claim. The Court of Appeals then concluded that the state court probably did not intend to excuse the procedural default. The Court of Appeals, however, did not remand for a hearing on whether Petitioner could show "cause and prejudice" under *Wainwright* v. *Sykes*. *See Preston* v. *Maggio*, 705 F.2d 113, 117 (5th Cir. 1983) (after finding state procedural default, court remands for hearing on cause and prejudice).

state court order lacks a plain statement that it rests on Petitioner's procedural default. Thus, Petitioner is entitled to full federal review of the state court's order regarding the merits of his constitutional claim.

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded to that court for consideration of the merits of Petitioner's constitutional claim.

Respectfully submitted,

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No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,

Petitioner,

vs.

MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, should that ambiguity be resolved in favor of affording habeas review of the constitutional claim?

2. Whether the appellate court's opinion, although lacking an explicit statement of the holding, found that petitioner waived all claims but the alibi-related claim when he failed to present them on direct appeal?

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No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,

Petitioner,

vs.

MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

State Court Proceedings

The petitioner, Warren Lee Harris, was convicted of murder on February 2, 1978, in the Circuit Court of Cook County and sentenced to serve 50-100 years. (J. App. 1)

On direct appeal the petitioner was represented by the State Appellate Defender and raised one issue: whether he was proved guilty beyond a reasonable doubt. The Illinois Appellate Court, First District, rejected petitioner's contention in an opinion unpublished pursuant to Illinois Supreme Court Rule 23. *People v. Harris*, 71 Ill. App. 3d 1113 (1979). (J. App. 5)

Petitioner filed a *pro se* petition for post-conviction relief. (J. App. 10) Private counsel was appointed to represent him and an amended petition was prepared and filed. (J. App. 10) The amended petition alleged that petitioner was denied his right to effective assistance of counsel in that his trial counsel failed to prepare for trial because he did not interview or call certain witnesses, failed to seek the identity of the informant, failed to call a certain rebuttal witness, failed to enter an offer of stipulation that would perfect an impeachment, failed to investigate an alibi defense, and failed to tell petitioner there would be no alibi defense and ignored petitioner's objection to this decision. (J. App. 10-11) The petition was dismissed without evidentiary hearing. (J. App. 11)

The petitioner appealed from this denial. He claimed that an evidentiary hearing should have been held or that the State should have been required to file an answer rather than a motion to dismiss. (J. App. 11) The Appellate Court, First District, affirmed the circuit court's decision to dismiss the petition in a Rule 23 Order which discussed both procedural default and the merits of some of petitioner's claims. (J. App. 9)

Federal Habeas Corpus Proceeding

The petitioner filed a petition for writ of habeas corpus challenging his conviction and then filed an amended

petition in March of 1980. (J. App. 23) The respondents moved for summary judgment on the ground that the petitioner had a viable state court action pending by way of post-conviction and the petitioner had not exhausted his state remedies. (J. App. 23)

On June 11, 1981, Magistrate Sussman recommended to Judge Flaum that he grant respondents' motion. However, on December 29, 1981, Judge Flaum rejected the recommendation on the ground that the post-conviction action in the Illinois court had been resolved against the petitioner. On January 6, 1982, Magistrate Sussman recommended that the parties brief a single issue: whether newly-discovered evidence existed which exonerated the petitioner. The magistrate suggested that the claim that the post-conviction remedy had been unreasonably delayed was now moot and the ineffective assistance of counsel claim was raised at the post-conviction hearing but not in the federal habeas corpus action.

On May 17, 1982, the respondents asked the court to stay the order or reconsider the order and dismiss the case on the ground that the petitioner had an appeal from the post-conviction denial pending in the state court. The Magistrate accordingly recommended that the cause be dismissed for exhaustion pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982). Judge Flaum adopted this recommendation on October 4, 1982, and dismissed the petition. (J. App. 23)

On April 4, 1983, Judge Flaum granted petitioner's motion to reinstate the action since the appeal of the petition for post-conviction relief had been resolved against the petitioner. (J. App. 23) He permitted the petitioner to file an amended petition. The petitioner filed his amended brief on April 11, 1983. It raised four claims: 1) the hear-

ing on his post-conviction petition was unreasonably delayed; 2) defense counsel rendered ineffective assistance at trial; 3) new evidence exonerates him; and 4) he was not proved guilty beyond a reasonable doubt. (J. App. 20-23)

The cause was reassigned to Judge Getzendanner on August 25, 1983. On October 20, 1983, respondents filed an answer and motion for summary judgment with supporting memorandum. Procedural default was raised in response to the ineffective assistance claims. The petitioner filed a motion in opposition, or alternatively, a cross-motion for summary judgment on November 21, 1983.

On April 8, 1985, Judge Getzendanner granted respondents' motion for summary judgment as to all claims except the ineffective assistance of counsel claim. (J. App. 45) As to this allegation, the judge rejected that the claim was waived and ordered an evidentiary hearing. (J. App. 44) This opinion is reported at 608 F. Supp. 1369. (J. App. 15) The evidentiary hearing took place on three afternoons over November 4, November 14, and November 26, 1986. In lieu of closing argument on the evidence, the parties submitted post-evidentiary hearing memoranda of law by February 26, 1986. (J. App. 45) On May 30, 1986 the judge entered summary judgment for respondents and denied the petition. (J. App. 67)

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed Judge Getzendanner's decision. (J. App. 68)

SUMMARY OF ARGUMENT

I. When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, that ambiguity should be resolved in favor of the state ground so that habeas review is unavailable absent a showing of cause and prejudice. On habeas review, there should be a uniform presumption that the state courts have followed state procedural rules.

This Court has recognized the importance of honoring state procedural rules and that federal intrusion in procedural default cases undercuts the State's ability to enforce its procedural rules.

Procedural default rules are rigidly enforced by Illinois' courts. For example, Illinois' rule that, failure to raise an issue on appeal waives it for purpose of post-conviction review, is relaxed only where required by fundamental fairness. Similarly, the rule of default for failure to timely object to a jury instruction is relaxed only to correct grave errors or where the case is so close factually that fundamental fairness requires the instruction. Illinois Supreme Court Rules allow a limited exception to the general waiver rule, providing that plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Often, when a claim of error is not properly preserved for review, a state appellate court rejects the claim under "plain error" analysis. In doing so, the court may discuss the merits of the claim to determine whether the alleged error affected substantial rights. If the issue is decided against

the defendant, the appellate court is obviously holding that there is no plain error and the waiver rule should not be relaxed.

Rigid enforcement of waiver and default rules by Illinois courts serve important interests. Failure to make objection strips the trial court of the ability to correct the alleged error. Failure to raise issues in post-trial motions denies the trial court the ability to assess its own alleged errors. Failure to limit the review process by requiring the earliest possible identification of errors allows for open-ended appellate and collateral review.

It will do mischief to Illinois' rules of waiver to accept petitioner's invitation to declare that federal habeas courts should approach default cases with the presumption that state procedural rules must be ignored unless the state court included a mechanical recitation that state law has been followed. Judges are presumed to properly perform their duties and adherence to procedural rules is among the most important of those duties.

Comity requires federal courts to begin with the presumption that the state court has followed its law—not ignored it—unless it explicitly states otherwise. At the very least, the question should be left open to individual interpretation.

Unlike the issue in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this is not a case where the merits turn on application of either state or federal law and where it is unclear which law has been applied. In this case, waiver has been discussed and no exceptions to the waiver rules are apparent. Under these circumstances, this Court should assume that the appellate court followed Illinois law.

Respondents' position has been adopted by the Second, Sixth and Eleventh Circuit Courts of Appeals. No fundamental miscarriage of justice can result from this rule since the cause-and-prejudice standard protects against any instance of unjust incarceration.

II. The appellate court's opinion on post-conviction review found that petitioner waived all claims but the alibi-related claim when he failed to present them on direct appeal. The opinion does not mechanically state that "we therefore find the issue waived," but no fair review of the court's discussion, can lead to any other conclusion.

In the opinion, the court stated it was aware of the People's argument that defendant waived his right to assert the claim by his failure to raise it on direct appeal. It stated the general rule that an available claim not raised on direct appeal is waived for purposes of post-conviction review. It stated that this rule does not apply where the claim is based on acts beyond record on appeal. And it found that the claims on post-conviction, with the exception of the alibi claims, were matters which could have been raised on direct appeal.

A habeas court should not interfere with this determination of default under state procedural rules.

ARGUMENT

I.

WHEN A STATE COURT OPINION IS UNCLEAR WHETHER IT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS OR THE MERITS OF A FEDERAL CONSTITUTIONAL CLAIM, THAT AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF THE STATE GROUND SO THAT HABEAS REVIEW IS UNAVAILABLE ABSENT A SHOWING OF CAUSE AND PREJUDICE.

Petitioner urges this Court to adopt a uniform principle consistent with the rule of *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Under this approach petitioner proposes that federal courts conducting habeas corpus review of state court decisions should presume that the state courts below did not rely on waiver or procedural default in reaching their disposition unless the state court's opinion plainly states that default was found and relied upon.

The respondents agree with the general proposition that a uniform principle may be preferable to an *ad hoc* approach to default questions. The respondents sharply disagree, however, with the suggestion that there should be a uniform presumption that the state courts have not followed state procedural rules.

This Court has recognized the importance of honoring state procedural rules. For instance, in *Wainwright v. Sykes*, 433 U.S. 72, 88-89, 97 S.Ct. 2497, 2507-2508, 53 L.Ed.2d 594, 609 (1977), this Court explained that:

> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to § 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

This Court has recognized similar considerations where the issue involved default by failure to raise a claim on appeal in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Of particular significance to this case is this Court's expression of concern in *Engle v. Isaac* that federal intrusion in procedural default cases undercuts the State's ability to enforce its procedural rules. *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783, 801 (1982).

Procedural default rules are rigidly enforced by Illinois' courts. For example, in Illinois, the failure to raise an available issue on direct appeal waives the issue for the purpose of review pursuant to the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. ch. 38, ¶ 122-1 *et seq.*) *People v. Brown*, 52 Ill. 2d 227, 287 N.E.2d 663 (1972); *See also People v. Edmonds*, 79 Ill. App. 3d 33, 34, 398 N.E. 2d 230, 233 (1st Dist. 1979). The Illinois Supreme Court

has recently reemphasized this rule in *People v. Gaines*, 105 Ill. 2d 79, 87-88, 473 N.E.2d 868, 873 (1984), *cert. denied, sub nom. Gaines v. Illinois*, 471 U.S. 1131, 105 S.Ct. 2666, 86 L.Ed.2d 282 (1985) ("where an appeal was taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those that could have been presented but were not are deemed waived.")

The appeal/post-conviction waiver rule will only be relaxed where required by fundamental fairness. *People v. Weaver*, 45 Ill. 2d 136, 138, 256 N.E.2d 816, 817 (1970). The Illinois Supreme Court has recently refused to relax this rule and its limited exception even in capital cases. *People v. Jones*, 109 Ill. 2d 19, 485 N.E.2d 363 (1985), *cert. denied, sub nom. Jones v. Illinois*, 475 U.S. 1090, 106 S.Ct. 1481, 89 L.Ed.2d 735 (1986).

In *People v. Roberts*, 75 Ill. 2d 1, 10-16, 387 N.E.2d 331, 335-337 (1979), the Illinois Supreme Court emphasized that its procedural rules are relaxed only rarely. The court considered the waiver of objection to jury instructions. In its analysis, the court discussed Illinois Supreme Court Rule 451(c) (58 Ill. 2d R. 451(c)), which concerns jury instructions and provides, in part, that "substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." The court concluded that the provisions of Rule 451(c) constitute:

> a limited exception (*People v. Underwood* (1978), 72 Ill. 2d 124, 129-30), to be used to correct grave errors (*People v. Jenkins* (1977), 69 Ill. 2d 61, 66), or to be applied where the case is close factually and fundamental fairness requires that the jury be properly instructed (*People v. Joyner* (1972), 50 Ill. 2d 302, 307).

People v. Roberts, supra, 75 Ill. 2d at 14, 387 N.E.2d at 337.

Illinois Supreme Court Rules also provide only a very limited exception to the general waiver rule. Rule 615(a) provides: "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." (58 Ill. 2d R. 615(a).) Like Rule 451(c), the "plain error" rule is narrow. *People v. Pastorino*, 91 Ill. 2d 178, 188, 435 N.E.2d 1144, 1149 (1982).

Often, when dealing with a claim of error not properly preserved for review, a state appellate court will reject the claim by means of the "plain error" analysis. In doing so, the court will frequently discuss the merits of the claim in order to determine whether an error affecting substantial rights has been committed. If the issue is decided against the defendant, the appellate court, in effect, is holding that there is no plain error and, therefore, the waiver rule should not be relaxed.

The rigid enforcement of waiver and default rules by Illinois courts, and the very narrow exceptions allowed thereto, serve many important interests of the justice system, the judiciary, and the People of the State of Illinois. Failure to make timely objection, for example, strips the trial court of the ability to cure or correct the alleged error. *See People v. Roberts, supra*, 75 Ill. 2d at 11, 387 N.E.2d at 336. Failure to raise issues in post-trial motions denies the trial court of the ability to assess its own alleged errors and places needless burden on counsel and the courts in preparing and processing appeals. *People v. Caballero*, 102 Ill. 2d 23, 31, 464 N.E.2d 223, 227 (1984), *cert. denied, sub nom. Caballero v. Illinois*, 469 U.S. 963, 105 S.Ct. 362, 83 L.Ed.2d 298 (1984). Similarly, the failure to limit the review process by requiring the earliest possible identification of errors considered to be significant allows for the prospect of open-ended appellate and col-

lateral review. *Cf. People v. Caballero, supra*, 102 Ill. 2d at 31, 464 N.E.2d at 227. ("Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended.")

It will do illogical mischief to Illinois' rules of waiver and default to accept petitioner's invitation to declare that federal courts, on habeas corpus review, should approach default cases with the presumption that the courts of Illinois ignored basic and rigid procedural rules unless the Illinois courts have included in their opinion some mechanical recitation affirming that Illinois law has been followed. It is well-settled that judges are presumed to properly perform their duties. *Bute v. Illinois*, 333 U.S. 640, 671, 68 S.Ct. 763, 779, 92 L.Ed. 986 (1948); *See also Winegar v. Corrections Dept.*, 400 F. Supp. 392, 397 (W.D. Mich. 1975), *aff'd*, 549 F.2d 803 (6th Cir. 1976), *cert. denied*, 430 U.S. 972, 97 S.Ct. 1660, 52 L.Ed.2d 366 (1977). Certainly, the adherence to procedural rules is among the most important of those duties.

Federal courts should begin their analysis of state court application of state law with the presumption that the state court has followed its law—not that it has ignored it. If there is to be a presumption which controls in procedural default cases, the respondents respectfully urge that comity demands that a federal habeas court presume that the state court has followed its law unless it explicitly states otherwise. At the very least, the question should be left open to individual interpretation as opposed to a presumption that the state court has ignored its law.

Unlike the issue in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), state procedural default does not leave open any confusion over whether the state court has relied on state or federal law. In *Long*,

this Court explicitly based its opinion on a situation where the:

> state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, *and* when the adequacy or independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. (emphasis added)

Michigan v. Long, supra, 463 U.S. at 1040, 103 S.Ct. at 3476, 77 L.Ed.2d at 1214.

The search in question in *Long* presented search and seizure issues under both the Michigan and the United States Constitutions. In that case, it would have been possible to invalidate the search regardless of the federal constitutional claims based on a merits analysis of the same facts under Michigan law. In this case, there is no implication to *any* federal law or constitutional provision resulting from the state procedural rulings. There is no reference to any federal precedent in the appellate court's discussion of the waiver question. Moreover, there is no possibility in view of *Wainwright v. Sykes, supra*, and its progeny, that procedural default is not an adequate independent state ground.

This is not a case, like *Long*, where the merits may turn on application of either state or federal law and where it is unclear which law has been applied. This is a case where waiver has been found pursuant to state rules and where no exceptions to the waiver rules are apparent. Under these circumstances, this Court should assume that the appellate court has followed Illinois law unless the state court explicitly declares otherwise. *See e.g., People v. Ross*, 63 Ill. App. 3d 884, 380 N.E.2d 897 (1st Dist.

1978) (where the court noted the waiver problem and explicitly went on to consider the merits).

The position respondents advocate here is that adopted by the Second, Sixth and Eleventh Circuit Courts of Appeals. *See Martinez v. Harris*, 675 F.2d 51, 54 (2nd Cir. 1982), *cert. denied*, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982); *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983); *Campbell v. Wainwright*, 738 F.2d 1573, 1578 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126, 106 S.Ct. 1652, 90 L.Ed.2d 195 (1986). Under these decisions, if a prosecutor argues the merits and also argues default in the alternative, the federal habeas court should hold the petitioner to demonstrating "that the state has created in his case an exception to the established rule and reached the merits." *Campbell v. Wainwright*, 738 F.2d at 1578.

No fundamental miscarriage of justice can result from this rule since the cause-and-prejudice standard protects against any instance of unjust incarceration. *Engle v. Isaac*, 456 U.S. at 129, 135; *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986). There is nothing fundamentally unfair about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. *Smith v. Murray*, 106 S.Ct. at 2668.

II.

THE APPELLATE COURT'S OPINION, ALTHOUGH LACKING AN EXPLICIT STATEMENT OF THE HOLDING, FINDS THAT PETITIONER WAIVED ALL CLAIMS BUT THE ALIBI-RELATED CLAIM WHEN HE FAILED TO PRESENT THEM ON DIRECT APPEAL.

While there does seem to be an ambiguity on the face of the opinion on the question of to what extent the ap-

pellate court relied on the procedural default, there is no question that the appellate court found that there was a procedural default. It is true that the Illinois Appellate Court's opinion does not mechanically state that "[w]e therefore find the issue waived." No fair review of the court's discussion, however, can lead to any conclusion other than that the court clearly found the claim to be waived.

In addressing this issue, the court explained that

> The State initially responds that defendant has waived his right to assert a claim of the incompetence of his trial counsel because he failed to raise this issue in his direct appeal.
>
> It is well settled that where a direct appeal is taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those which could have been presented, but were not, are considered waived. (*People v. French* (1970), 46 Ill. 2d 104, 262 N.E.2d 901.) Where, however, the allegations in a post-conviction petition are based on facts which do not appear in the record, they are not barred by the doctrine of *res judicata*. *People v. Edmonds* (1979), 79 Ill. App. 3d 33, 398 N.E.2d 230.
>
> In the instant case, defendant alleges incompetence because his trial counsel failed to investigate or call several witnesses on his behalf, to perfect impeachment of the State's chief witness, or to investigate and present an alibi defense. Our examination of the record in this appeal indicates that, except for the alibi witnesses, the identity of the persons set forth by the defendant and their statements to the police were of record, and it also appears that the stipulation alluded to by defendants was contained in the trial record. As such, these matters could have been raised in defendant's direct appeal. (See *People v. Churchill* (1981), 92 Ill. App. 3d 1006, 416 N.E.2d 395.) In this regard we find it noteworthy that defen-

> dant's appellate counsel was not affiliated in any way with his trial counsel, and there is also no indication that defendant expressed any dissatisfaction with his trial counsel at the time the appeal was filed or raised any question regarding the competency of his trial counsel. See *People v. Stewart* (1978), 66 Ill. App. 3d 342, 383 N.E.2d 1179.

(J. App. 12)

Thus, the court

> 1. recognized that the People were arguing that the claim was waived because it had not been presented on direct appeal;
>
> 2. stated that the general rule was that an available claim that is not raised on direct appeal is waived for purposes of post-conviction review;
>
> 3. recognized that this rule does not apply where the claim is based on facts beyond the record on appeal, and;
>
> 4. found that defendant's claims on post-conviction, with the exception of the alibi claims, were all matters which could have been raised on direct appeal.

The respondents respectfully suggest that although lacking a mechanical statement of the holding, the appellate court's opinion finds waiver of all claims not based on the alibi defense. The respondents respectfully suggest that this Court should not interfere with this state court determination of default under state procedural rules.

CONCLUSION

WHEREFORE, the respondents ask this Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit and uphold the denial of the petition for writ of habeas corpus.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1988

WARREN LEE HARRIS,

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MARVIN REED, Warden,
and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
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ARGUMENT

I. RESPONDENTS AND SUPPORTING AMICI FAIL TO ARTICULATE ANY SOUND REASON WHY THE PLAIN STATEMENT RULE OF *MICHIGAN* V. *LONG* SHOULD NOT APPLY TO HABEAS CASES.

When a federal court is forced to evaluate an ambiguous state court opinion, it is best able to maintain the principles of comity and consistency if it follows the plain statement rule articulated by the Court in *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). Neither Respondents nor *Amici* offer any sound reason why federal courts should not apply the plain statement rule to habeas cases as is already done in direct appeal cases. Indeed, the Brief of *Amicus Curiae* State of Florida completely ignores the *Long* decision as well as its progeny *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). Thus, Respondents and *Amici* avoid the key issue before the Court.

Avoiding the key issue, Respondents contend that application of the plain statement rule to habeas cases will "do illogical mischief to Illinois rules of waiver and default." (Respondents' Brief at 12). To avoid this alleged mischief, Respondents urge adoption of a presumption in favor of waiver and default. (*Id.*) A review of Illinois rules of waiver and default, however, reveals that Respondent's contention of "illogical mischief" is unfounded and that the presumption urged by Respondents would create its own mischief.

A. Respondents' Contention Of "Illogical Mischief" Is Unfounded.

Waiver rules are not rigidly enforced by Illinois courts in cases arising under the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.* ch. 38, par. 122-1 *et seq.* (1987). The Act provides that any imprisoned person who asserts that his constitutional rights were denied in the trial that

resulted in his conviction may file a post-conviction petition seeking review of the constitutional issue. *Ill. Rev. Stat.* ch. 38, par. 122-1 (1987). The only statutory reference to waiver of claims appears in Paragraph 122-3 as follows: "Any claim or substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Ill. Rev. Stat.* ch. 38, par. 122-3 (1987).

Illinois courts have narrowed this broad right of post-conviction review somewhat by applying the common law doctrine of *res judicata*. As correctly noted by Respondents, the Illinois Supreme Court held in *People* v. *Gaines*, 105 Ill.2d 79, 87-88, 473 N.E.2d 868, 873 (1984), *cert. denied, sub nom. Gaines* v. *Illinois*, 471 U.S. 1131 (1985), that "where an appeal was taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those that could have been presented but were not are deemed waived." Respondents neglect, however, to mention that the *Gaines* decision continued with the statement that "*[t]he strict application of the doctrine of res judicata may be relaxed, however, where fundamental fairness so requires.* [citations omitted]." *Id.* at 91, 473 N.E. 2d at 875 (emphasis added).

A review of Illinois cases shows that "fundamental fairness" frequently results in relaxation of *res judicata* principles-particularly when the issue involves the effectiveness of trial or appellate counsel. In *Gaines*, for example, the Illinois Supreme Court observed that the petitioner had not raised ineffective assistance of counsel as an issue in his direct appeal and that, ordinarily, the doctrine of *res judicata* would bar him from raising the issue in his post-conviction petition. "Fundamental fairness," however, compelled the court to relax its waiver

rule and address the merits of the petitioner's constitutional claim. *Id.* at 91-96, 473 N.E. 2d at 875-879.

Similarly, in *People* v. *Frank*, 48 Ill.2d 500, 503, 272 N.E.2d 25, 27 (1971), the Illinois Supreme Court held that the doctrine of *res judicata* would not bar the assertion of constitutional claims in a post-conviction petition when the alleged waiver stemmed from the inaction of incompetent appointed counsel. *See also People* v. *Martinez*, 104 Ill.App.3d 990, 991, 433 N.E.2d 981, 983 (1st Dist. 1982) (failure to raise ineffective assistance of counsel on direct appeal excused in post-conviction proceeding); *People* v. *Talley*, 97 Ill.App.3d 439, 442, 422 N.E.2d 1084, 1087 (1st Dist. 1981) ("the rule of waiver is not unyielding [in post-conviction proceedings)"; *People* v. *Cowherd*, 114 Ill.App.3d 894, 898, 449 N.E.2d 589, 591 (2d Dist. 1983) (fundamental fairness requires relaxation of doctrine of *res judicata*); *People* v. *Green*, 34 Ill.App.3d 153, 155. 340 N.E.2d 58, 60 (1st Dist. 1975) (fundamental fairness compelled review of ineffective assistance of counsel claim even though not raised on direct appeal); *People* v. *Ruiz*, 24 Ill.App.3d 449, 321 N.E.2d 746 (1st Dist. 1974) (fundamental fairness required review of issue even though not raised on direct appeal); *People* v. *Hayes*, 144 Ill.App.3d 696, 494 N.E.2d 1238 (2d Dist 1986) (appellate court reviewing denial of post-conviction petition will not apply *res judicata* as waiver to bar defendant from raising claim that his counsel's failure to raise Posse Comitatus Act issue at trial and on appeal constituted ineffective assistance of counsel); Wangerin, *"Plain Error" and "Fundamental Fairness": Toward A Definition of Exceptions to the Rules of Procedural Default*, 29 *De Paul L. Rev.* 753, 771 (1980) ("defects in counsel - either *pro se* appearances, incompetence, or improper conduct - serve as the basic tools for avoiding the *res judicata* effect of Illinois' inter-

pretation of its post-conviction relief statute"). Thus, Respondents' assertion that "[p]rocedural default rules are rigidly enforced by Illinois courts" is not true in the context of post-conviction proceedings involving claims of ineffective assistance of counsel.

Also untrue is Respondents' unsupported theory that "if the issue [the merits] is decided against the defendant, the appellate court, *in effect*, is holding that there is no plain error and, therefore, the waiver rule should not be relaxed." (Respondents' Brief at 18, emphasis added.) In many of the cases cited in the preceding paragraph of this brief, the appellate courts first relaxed the waiver rule and then decided against the petitioner on the merits. Relaxation of the waiver rule, contrary to Respondents' assertion, does not necessarily depend on the outcome of the appellate court's decision on the merits.

Furthermore, application of *Long's* plain statement rule in federal habeas cases will not do "illogical mischief" to Illinois' rules of waiver and default as Respondents claim. (Respondents' Brief at 12.) The plain statement rule will not preclude Illinois courts from invoking the doctrine of *res judicata* as a basis for denying review of constitutional claims in proceedings under the Illinois Post-Conviction Hearing Act. The rule requires only a plain statement of the basis for the court's judgment if the court intends to preclude federal review. Illinois courts have had no difficulty invoking the doctrine of *res judicata* as a basis for judgment in post-conviction proceedings, when that is their intent. *See e.g.*, *People* v. *Mitchell*, 163 Ill.App.3d 1007, 517 N.E.2d 20 (4th Dist. 1987); *People* v. *Buckolz*, 24 Ill.App.3d 324, 320 N.E.2d 421 (5th Dist. 1974); *People* v. *Johnson*, 16 Ill.App.3d 79, 305 N.E.2d 697 (1st Dist. 1973). Thus, the plain statement rule will impose no great additional burden on Illinois courts.

The plain statement rule is also acceptable to at least three of the *amici*. Indeed, the *Amici* Brief of the States of California, Mississippi, and North Carolina embraces the plain statement rule, cites *Caldwell* and *Long* with approval and states:

> As long as the state plainly relies on a procedural bar, regardless of whether it also alternatively determines the weakness of the merits, the state defendant should be procedurally barred from obtaining relief in federal habeas corpus proceedings.

(*Amici* Brief of California, *et al.* at p. 4.) These *amici* do not ask that the decision below be affirmed. They ask only that the Court not adopt the position of the Court of Appeals of the Ninth Circuit that allows habeas review whenever the state court relies alternatively on the twin grounds of procedural default and the merits. *See Bradford* v. *Stone*, 594 F.2d 1294, 1296, n.2 (9th Cir. 1979); *see also Brasier* v. *Douglas*, 815 F.2d 64, 65 (10th Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3271 (1987). In other words, the Ninth Circuit allows habeas review unless the state court relies exclusively on a procedural default—a position the Petitioner does not advocate here.

Petitioner also has no quarrel with the other red herring in this case, this one raised by Respondents, that federal courts should presume that "the state court has followed its law—not that it has ignored it." (Respondents' Brief at 8 and 12.) Respondents assert that they sharply disagree "with the suggestion that there should be a uniform presumption that the state courts have not followed state procedural rules." (*Id.* at 8.) Petitioner is not aware that anyone has made such a suggestion. Petitioner has only suggested application of the plain statement rule which, recognizing that state courts sometimes invoke waiver and sometimes excuse it in accordance with

state law, requires that they articulate what they are doing so that federal courts can properly respect an adequate and independent state ground for the judgment. Any presumption that state courts are following their law must take into account that state law in almost all jurisdictions allows for waiver of procedural default in some circumstances. In sum, application of *Long's* plain statement rule clearly will not interfere with procedural default rules in Illinois or any other state.

B. Respondents' Presumption In Favor Of Waiver Would Work Its Own Mischief.

Petitioner does quarrel with Respondents' proposed presumption in favor of waiver. Such a presumption would work its own mischief. Illinois courts regularly write decisions that, although they discuss both procedural defaults and the merits, are based on the merits. Illinois courts address and rely on the merits in those cases, despite the procedural default, when they determine that fundamental fairness or other reasons require that the default or waiver be excused. As stated in *Cooper* v. *Wainwright*, 807 F.2d 881, 886 (11th Cir. 1986), *reh'g denied*, 811 F.2d 612 (1987), *cert. denied sub nom., Dugger* v. *Cooper*, ___ U.S. ___, 107 S.Ct. 2183 (1987), "[w]hen a state court decides a constitutional question, even though it does not have to, it necessarily holds that the policies underpinning its procedural rule are unworthy of vindication under the particular circumstances of the case before it." Comity between state and federal courts, encouraged by the Court in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), is served by respecting the state court's determination that its procedural default rules do not require enforcement in a particular case. *See Cooper*, 807 F.2d at 886. Comity also is served by allowing state courts to reach the merits of federal constitutional claims if they choose to do so.

Respondents' presumption in favor of waiver and default in contrast, would undermine these comity considerations. Federal courts, instead of respecting a state court's decision to reach the merits notwithstanding a procedural default, would be compelled to treat the state court's decision on the merits as *dictum*. State courts would be reluctant to address, or even mention, procedural default issues for fear of having a decision on the merits misconstrued as *dictum*.

Respondents' presumption in favor of waiver also is incompatible with settled precedent that "courts indulge in every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1983). *See also Brewer* v. *Williams*, 430 U.S. 387, 440 (1977); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). In fact, in *Long*, the Court refused to adopt a presumption in favor of waiver that would result in outright dismissal of direct appeal cases. The Court stated:

> Finally, outright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily on federal grounds and where the *independence* of the alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate "where there is strong indication . . . that the federal constitution as [sic] judicially controlled the decision below." *[Minnesota* v.] *National Tea Co. supra*, 309 U.S., at 566, 60 S.Ct. 679.

463 U.S. at 1040. Respondents offer no reason why the Court, having rejected a presumption in favor of waiver and dismissal in direct appeals, should now adopt such a presumption in habeas cases.[1]

---

[1] The *amicus*, State of Florida, also argues for a similar presumption, namely, that once a state court conviction has become "final,"

(footnote continued on next page)

The cases cited by Respondents in support of a presumption in favor of waiver are not persuasive. *Martinez v. Harris*, 675 F.2d 51, 54 (2d Cir. 1982), *cert. denied*, 459 U.S. 849 (1982), and *Raper* v. *Mintzes*, 706 F.2d 161 (6th Cir. 1983), were decided before *Michigan* v. *Long*. Respondent's third case, *Campbell* v. *Wainwright*, 738 F.2d 1573, *reh'g denied en banc*, 746 F.2d 815 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126 (1986), which simply follows *Martinez* and does not address *Long*, was decided before the Court applied the plain statement rule to procedural defaults in *Caldwell*.

Respondents also do not mention more recent decisions from the lower courts that flatly reject Respondents' position. In *Hardin* v. *Black*, 845 F.2d 953, 958-59 (11th Cir. 1988), for example, the court states:

> It is abundantly clear that the *Sykes*' procedural default rule does not preclude federal habeas review of a petitioner's constitutional claims if the state court declines to apply a procedural bar and adjudicates the federal claim on the merits . . . . In the event that the federal court cannot decide on which basis the state court relied to deny collateral relief - whether because the claims were foreclosed by procedural default or because they were considered to lack merit - the federal court must address the claim on the merits.

(footnote continued from previous page)
that is, direct appeals have become exhausted, it should not be subjected to habeas review unless the state "through unambiguous language" indicates that it does not rest on a procedural ground. The State of Florida nowhere refers to either *Long* or *Caldwell*. The obvious and illogical implication of its distinction between "non-final" cases on direct appeal and "final" cases in habeas proceedings is that while ambiguity cannot be tolerated in direct appeals, it may be tolerated in habeas cases.

See also Mann v. *Dugger*, 844 F.2d 1446, 1448, n. 4 (11th Cir. 1988) (habeas review of constitutional claim not barred when Supreme Court of Florida ruled on merits in defendant's post-conviction proceeding even though defendant failed to raise issue in direct appeal).

Respondents' final argument in support of a presumption in favor of default is equally unpersuasive. Respondents argue that "[n]o fundamental miscarriage of justice can result from this rule [presumption in favor of default] since the cause-and-prejudice standard protects against any instance of unjust incarceration." (Respondents' Brief at 14.) In other words, it does not matter if there really is an adequate and independent state ground, because the "cause and prejudice" test of *Sykes* will cure any injustice.

Respondents' argument turns *Sykes* on its head. The basic premise underlying *Sykes* is that the state court has determined that its judgment is based on adequate and independent state grounds and that that determination should be respected by a federal court in a *habeas* case. Nowhere in *Sykes* or its progeny, including the cases the Respondents cite for this argument, *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982), and *Smith* v. *Murray*, 477 U.S. 527 (1986), is there any indication that a federal court in habeas cases need not concern itself with the adequacy and independence of the state ground because the "cause and prejudice" test serves as some type of "safety net." If no adequate and independent state ground exists, then a federal court has an unflagging duty to review the merits of a habeas petitioner's claim. *See Brown* v. *Allen*, 344 U.S. 443, 458 (1953).

As Professor Yackle has pointed out:

> In *Sykes* itself the court did not plunge ahead to determine whether the applicant in that case had

> offered a sufficient reason for a procedural default in state court. First the court appraised the adequacy of the state's procedural ground of decision and determined, independent of the "cause" and "prejudice" analysis, that the procedural ground at work in the case would have been sufficient to foreclose direct review in the Supreme Court itself. It follows that if a state ground is found inadequate, the matter ends then and there - and the door to habeas review is thrown open. For it hardly can be proposed that the court would permit a state ground of decision that would *not* foreclose direct review to have that very effect in habeas corpus.

Yackle, *Postconviction Remedies*, 384, p. 153 (1988 Cum. Supp.). *See also Breest* v. *Perrin*, 655 F.2d 1, 2, n. 1 (1st Cir. 1981), *cert. denied*, 454 U.S. 1059 (1981) (the adequacy and independence of the asserted state procedural bar must be determined before applying the *Sykes* "cause and prejudice" test). Hence, the "cause and prejudice" test is no substitute for a plain statement of an adequate and independent state ground.

II. RESPONDENTS' ATTEMPT TO DISTINGUISH *LONG* IS UNPERSUASIVE.

Respondents first attempt to distinguish *Long* on the ground that it involved state substantive law and not a state procedural default. (Respondents' Brief at 12-13.) According to Respondents, "state procedural default does not leave open any confusion over whether the state court has relied on state or federal law." (*Id.* at 12.) Inexplicably, Respondents do not mention *Caldwell* v. *Mississippi*, which specifically extended the plain statement rule to procedural defaults in direct appeal cases. Respondents also do not explain why a state procedural default necessarily precludes confusion over whether the state court relied on the default or the merits. Unless the state court

plainly states the basis of its judgment, confusion certainly can exist over whether the state court relaxed its procedural default rules and relied on the merits of the petitioner's claim.

Respondents also argue that *Long* is distinguishable because the Supreme Court of Michigan discussed federal constitutional law. Respondents argue that in Petitioner's case "there is no implication to *any* federal law or constitutional provision resulting from the state procedural rulings."[2] (*Id.* at 13, emphasis added.) This argument is startling. The implication of Petitioner's procedural default, if relied upon as a basis for the Illinois Appellate Court's judgment, is that review of his ineffective assistance of counsel claim under the United States Constitution, Sixth Amendment is barred. The Illinois Appellate Court, like the Michigan Supreme Court, clearly discussed federal constitutional law. Petitioner's Post-Conviction Petition invoked the Sixth Amendment of the United States Constitution. In addressing the merits of his Sixth Amendment claim, the Illinois Appellate Court's decision was "interwoven with federal law" within the meaning of *Long*, 463 U.S. at 1040.[3]

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[2] Presumably, Respondents mean "state procedural default" when they refer to "state procedural rulings." There never was a ruling or a finding in the Illinois courts that Petitioner's constitutional claim was barred because of his procedural default.

[3] The Illinois Appellate Court cited *People* v. *Murphy*, 72 Ill.2d 421, 381 N.E.2d 1076 (1978), which in turn relied on *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *People* v. *Pendleton*, 104 Ill.App.3d 1104, 433 N.E.2d 1076 (1st Dist. 1982), and *People* v. *Martinez*, 104 Ill.App.3d 990, 433 N.E.2d 981 (1st Dist. 1982), both of which in turn rely on *Cuylie* v. *Sullivan*, 446 U.S. 335 (1980); and *People* v. *Elder*, 73 Ill.App.3d 192, 391 N.E.2d 403 (1st Dist. 1979), which in turn relied on *United States* v. *Ragen*, 166 F.2d 976 (7th Cir. 1948) and *United States* v. *Trigg*, 392 F.2d 860 (7th Cir. 1968), *cert. denied*, 391 U.S. 961 (1968). (J.A. at 12-14.)

Finally, the independence of any possible state law ground is not clear from the face of the opinion within the meaning of *Long*, *supra* at 1040. The Illinois Appellate Court order simply is ambiguous as to whether it relies on Petitioner's procedural default as an independent ground. Respondents' statement to the contrary that "[t]his is a case where waiver has been found pursuant to state rules and where no exceptions to the waiver rules are apparent" (Respondents' Brief at 13) is untrue. This case is before the Court precisely because there has been no explicit finding of waiver by the state courts. Respondents' further assertion that no exceptions exist reflects Respondents' ostrich-like view of Illinois waiver rules.

III. THE ILLINOIS APPELLATE COURT ORDER LACKS A PLAIN STATEMENT THAT IT RESTS ON AN ADEQUATE STATE GROUND AND THEREFORE THE MERITS OF PETITIONER'S CLAIM HAVE BEEN PRESERVED FOR FEDERAL REVIEW.

Respondents state that "[w]hile there does seem to be an ambiguity on the face of the opinion on the question of to what extent the appellate court relied on the procedural default, there is no question that the appellate court found there was a procedural default." (Respondents' Brief at 14-15.) Petitioner agrees. There is no question that Petitioner failed to raise ineffective assistance of counsel as an issue in his direct appeal. There is a question, however, as to whether the Illinois Appellate Court relied on Petitioner's default or on the merits of his constitutional claim as the basis for its order. As stated in *Morishita* v. *Morris*, 702 F.2d 207, 209 (10th Cir. 1983), the federal court "must inquire, not only if there is a state procedural bar, but whether the state itself applied the bar." Noting a procedural default is a far cry from relying

on that default as a bar to Petitioner's constitutional claim.

After conceding that the Appellate Court order is ambiguous regarding whether it relied on the procedural default, Respondents assert inconsistently that the Appellate Court clearly found the claim barred. (Respondents' Brief at 15.) Petitioner, and at least two federal judges below, disagree with the proposition that the Appellate Court found the claim barred. Even the majority in the Court of Appeals below agreed that the Illinois Appellate Court did not clearly find the claim barred. The majority below based its decision on its speculation as to what the Illinois Appellate Court probably meant to do. *Harris* v. *Reed*, 823 F.2d 684, 687 (7th Cir. 1987).

Respondents do nothing more than offer their own speculation. True, the Appellate Court order does discuss in the segment quoted by Respondents, that certain alibi witnesses were not of record and therefore were not required to be raised on direct appeal. (J.A. at 12.) In the segment of the decision which the Respondents do not quote, however, the Appellate Court proceeds to discuss the ineffective assistance issue generally. In its concluding paragraph, the court states:

> Viewing defendant's petition and supporting affidavits *in light of the record*, we do not believe that he has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court [sic].

(J.A. at 14, emphasis added.) Perhaps the Appellate Court intended its discussion of the merits as *dictum*. Yet, it is equally plausible that the Appellate Court dis-

cussed the doctrine of *res judicata* briefly and then, in accordance with Illinois law, decided against relying on the doctrine because of the importance and nature of Petitioner's constitutional claim, which the court believed it should resolve. The Appellate Court's true intentions are unclear. Its order presents federal courts with the very sort of difficulty that the plain statement rule would avoid.

Petitioner Warren Harris has a strong case that he was denied effective assistance of counsel.[4] The District Court and Judge Cudahy's concurring opinion both recognized that the case presented a "very close" question. Habeas review of such a close case should only be denied if the state court relied on the procedural default in a plain statement.

[4] Recently, the Seventh Circuit upheld the granting of a writ of habeas corpus on an ineffective assistance claim where defense counsel failed to investigate and call an alibi witness. *Montgomery* v. *Petersen*, 846 F.2d 407 (7th Cir. 1988).

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded to that court for consideration of the merits of Petitioner's constitutional claim.

Respectfully submitted,

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No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARREN LEE HARRIS,

Petitioner,

v.

MARVIN REED, WARDEN
AND NEIL F. HARTIGAN,
Attorney General of the State of Illinois

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit**

SUPPLEMENTAL BRIEF OF PETITIONER

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STATUTES

Ill. Rev. Stat. ch. 38, par. 122-1 *et seq.* (1987) 2

ARGUMENT

Petitioner calls the Court's attention to the recent decision in *Waterhouse* v. *Rodriguez*, 848 F.2d 375 (2d Cir. 1988), which was decided on June 3, 1988 and which appeared in the advance sheets after Petitioner submitted his Reply Brief to the printer. In *Waterhouse*, the Second Circuit departs somewhat from *Martinez* v. *Harris*, 675 F.2d 51 (2d Cir. 1982), *cert. denied*, 459 U.S. 849 (1982), which is relied on by Respondents in the case *sub judice*. (*See* Br. For Respondents at 14.)

In *Martinez*, the defendant failed to object at trial to a jury instruction. On appeal, the defendant argued for the first time that the instruction violated his constitutional rights. The prosecution argued that the defendant's claim was barred procedurally. The state appellate court affirmed defendant's conviction without opinion. The defendant then filed a petition for writ of habeas corpus in the United States District Court, which dismissed the petition on the ground that defendant's conviction rested on an adequate and independent state ground. The Court of Appeals for the Second Circuit affirmed, stating "we do not believe that the Appellate Division's silence evinces an intent to overlook the procedural error." 675 F.2d at 54.

In *Waterhouse*, the defendant failed to raise ineffective assistance of counsel at either the trial or intermediate appellate court level. On appeal to the state's highest court, the defendant argued for the first time that he had received ineffective assistance of counsel at trial. The prosecutor argued that the defendant had been represented effectively and that, in any event, his claim was barred procedurally. The state court affirmed the defendant's conviction without opinion. The defendant then filed a petition for writ of habeas corpus in the United States District Court which, after a trial on the merits, granted

the petition. On appeal, the Court of Appeals for the Second Circuit considered whether the defendant's procedural default was the basis for the state court's silent affirmance, as follows:

> When the state has urged affirmance of a conviction on procedural grounds as well as on the merits and the state appellate court affirms without opinion, a federal court affirms without opinion, a federal court will generally infer that the state appellate court based its decision upon the Petitioner's procedural default [citing *Martinez*] . . . . However, where a constitutional claim is clearly not subject to procedural forfeiture under state law, an inference that the state appellate court's silence indicates a decision resting on a procedural default rather than a negative view of the merits cannot be justified. Federal habeas review of the merits in such circumstances is not barred. *Hawkins* v. *LeFevre*, 758 F.2d 866, 874 (2d Cir. 1985).
>
> Under New York law, the Court of Appeals will entertain a claim of ineffective assistance of counsel despite the defendant's failure to raise that claim at trial or before the Appellate Division. [Citation omitted.]

As Petitioner noted in his Reply Brief, Illinois appellate courts frequently will entertain a claim of ineffective assistance of counsel in proceedings under the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.* ch. 38, par. 122-1 *et seq.* (1987), despite the defendant's failure to raise the claim at trial or on direct appeal. (*See* Reply Br. of Petitioner at 2-4.) In Petitioner's case, the claim was not silently entertained as in *Waterhouse*; it was expressly entertained in a several-page decision concluding with the statements:

> Viewing the defendant's petition and supporting affidavits in light of the record, we do not believe that he

has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court [sic].

(J.A. at 14.)

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

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No. 87-5677

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

WARREN LEE HARRIS
Petitioner,

v.

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private,

nonprofit, national membership organization headquartered in Washington, D.C., whose purpose is to insure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners. Counsel for both Mr. Harris and the State of Illinois have consented to the filing of an amicus curiae brief by NLADA.

NLADA is vitally interested in assuring that indigent prisoners throughout the country are guaranteed equal access to federal review of their constitutional claims which have been held defaulted on state procedural grounds. In this case, the Court will decide whether an indigent prisoner can obtain federal review of his claim of ineffective assistance of trial counsel, where the state court opinion was ambiguous in deciding the issue against him both on the basis of a procedural default as well as on the merits. NLADA respectfully requests this Court to consider its brief on this significant public question.

STATEMENT OF THE CASE

Mr. Harris was convicted of murder in 1977 and was sentenced to 50 - 100 years' imprisonment. His conviction was

affirmed on direct appeal, which raised only the issue of reasonable doubt (People v. Harris, 71 Ill.App.3d 1113, 392 N.E.2d 1386 (1979))[1]

Ineffective assistance of trial counsel was raised in the state court for the first time in Mr. Harris's post-conviction petition. The trial judge granted the State's motion to dismiss this petition on the basis of res judicata. The state appellate court affirmed the judge's ruling in a decision which suggested at one point that the issue of ineffective assistance of counsel had been waived, but then also indicated at another point that Mr. Harris had not been denied his sixth

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1 Joint Appendix references were not available when this brief was written.

amendment rights. (Unpublished Order of the Illinois Appellate Court: People v. Harris, No. 81-871, February 22, 1983)

When Mr. Harris persevered with his ineffective assistance of counsel claim by seeking habeas review in the federal court, the district court determined that the state appellate court had not "concluded" that the federal claim had been waived. The district court further ruled that the state court had "ignored" any waiver by appellate counsel's failure on direct appeal to raise the ineffectiveness claim. (Harris v. Reed, 608 F.Supp. 1369 (N.D. Ill. 1985)) After convening a three-day evidentiary hearing, the district court held against Mr. Harris on the merits and denied his request for a writ. (Unpublished Memorandum Opinion and Order, May 30, 1986)

A majority of the court of appeals disagreed with the district court's determination concerning the procedural default. The majority allowed that the state court order in question was ambiguous since there had been neither an explicit finding of waiver nor an express intention to ignore waiver, and because the state court had addressed the merits of some of Mr. Harris's claims of ineffective assistance of counsel after the court had clearly implied that these claims had been waived. Ultimately the court of appeals held that the state court had "intended" to find that Mr. Harris had waived all claims of ineffective assistance of trial counsel, except those that could only have been supported from facts not of record (i.e., the "alibi witnesses"). (Harris v. Reed, 822 F.2d 684, 685, 687 (7th Cir. 1987))

Finding that the state appellate court had ruled in the alternative -- both on the procedural ground as well as on the merits -- the court of appeals declined to review the federal issues. (Ibid.)

In a concurring opinion, one judge of the court of appeals thought that the ineffective assistance of counsel claim should not be treated as waived, since the state court had made no express determination that it had been waived and because the state court had in fact considered the issue on the merits. This judge preferred to "invoke a presumption that waiver not clearly found has been condoned." (Harris v. Reed, 822 F.2d at 687, Cudahy, C.J., concurring)

This court granted Mr. Harris's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The rule of Michigan v. Long, 463 U.S. 1032 (1983), that in order to preclude federal review on direct appeal a state court must have made a "plain statement" that an adequate and independent state substantive ground compelled its decision, should be applied to state rulings on procedural grounds in federal habeas proceedings. A "plain statement" rule is needed to insure that indigent prisoners have a chance to obtain federal review of their constitutional issues when state courts have been ambiguous in rendering their decisions. Fairness to the indigent prisoner dictates that he understand clearly the basis of the state court's denial of his federal claims.

The efficient functioning of the criminal justice system would also be best served by a "plain statement" rule.

When federal courts engage in the exercise of trying to divine the intent of state courts which are unclear in their reasons for denying relief, yet another level of litigation is added to the process. State courts, which can rightfully be offended by federal courts trying to ascertain their meaning, can control the extent of federal collateral review by merely making a "plain statement" of their holdings on state procedural grounds. The process now required in which federal courts must make a threshold determination of the state court's intent to allow or preclude or limit federal review would be less confusing and less time-consuming if a "plain statement" rule were adopted by this Court.

Finally, for administrative purposes as well as purposes of the equal

application of justice, indigent prisoners throughout the United States are entitled to a consistent and workable rule. Because of the conflicts among the circuits, and in some cases within the same circuit, indigent prisoners have no predictable way of knowing which of their claims may have survived for federal review. These concerns are especially paramount to death-row clients, whose very existence may depend upon federal review of their claims.

Because the state court decision denying Mr. Harris's claim of ineffective assistance of trial counsel fails to make a "plain statement" that it was decided on the basis of a procedural default, this Court should determine that this issue survived for federal review. This Court should then reverse the decision of the court of appeals and order that court

to review the district court's determination on the merits.

ARGUMENT

THE "PLAIN STATEMENT" RULE OF MICHIGAN V. LONG IS THE ONE SIMPLE, WORKABLE, UNIFORM AND FAIR STANDARD THAT SHOULD BE APPLIED TO STATE COURT HOLDINGS WHICH ARE AMBIGUOUS IN REGARD TO BEING BASED UPON PROCEDURAL DEFAULT OR UPON THE MERITS.

Since Wainwright v. Sykes, 433 U.S. 72 (1977), this Court has held that a state court decision resting upon an adequate and independent state procedural ground will bar federal habeas review absent a showing of cause and prejudice. Further, this Court has added that if a state court has not articulated that review of federal claims is barred by a state procedural rule, then a federal court "implies no disrespect for the State" by reviewing those claims. Ulster County Court v. Allen, 442 U.S. 140, 154 (1979).

This line of cases was refined in Michigan v. Long, 463 U.S. 1032 (1983), where this Court announced a requirement of a "plain statement" that the state court decision rested upon adequate and independent state grounds, and that any discussion on the merits buttressed by federal law was offered only for guidance and did not compel the result reached. In the absence of such a "plain statement," federal habeas review of constitutional claims would lie. Although Michigan v. Long involved a substantive state ground, this Court subsequently applied the same reasoning in regard to a state's procedural bar as an independent basis for disposing of the case. Caldwell v. Mississippi, 472 U.S. 320 (1985).

There is no question that in Mr. Harris's case, the state court decision is ambiguous; the four federal judges who

have viewed it have arrived at two different results. In light of such ambiguity, and the serious nature of the stakes involved to indigent prisoners, such ambiguity should not be resolved in favor of procedural default to preclude federal review on the merits. The last chance for federal review for an indigent prisoner, especially in a capital case, should not hinge upon a state court's ambiguity any more than it should upon how a federal court might construe that ambiguity.

Mr. Harris thought that he had been denied the effective assistance of trial counsel. His appellate counsel did not raise trial counsel's ineffectiveness on direct appeal, thereby foreclosing review of this issue under Illinois procedural law in regard to facts which were of record on direct appeal. When Mr. Harris

attempted to obtain state collateral review on this issue, he was denied this relief for a variety of reasons. He was informed that he failed to preserve the issue and he was also informed that his issue did not have any merit.

Mr. Harris next sought redress from a federal court, petitioning pro se that his sixth amendment right had been violated. The district court resolved the state court ambiguity in favor of Mr. Harris, deciding that any procedural default had been ignored when the state court ruled on the merits. Hence, the district court applied reasoning consistent with Michigan v. Long and accorded Mr. Harris review of his federal issue.

Mr. Harris was sentenced to an indeterminate prison term. However, the stakes are much higher for death-row indigent prisoners, whose very lives

depend upon the wording of state court decisions. If a state court has found a procedural default, then the prisoner knows he must argue "cause and prejudice" to obtain federal review under Sykes. If the state court has ruled on the merits, then the prisoner knows he must argue the merits of the federal claim to obtain relief. However, if the state court has been ambiguous in its holding, then the prisoner does not know how to argue. Requiring an indigent prisoner, especially in a capital case, to bear the burden of a state court's ambiguity on an issue as critical as federal review of constitutional claims works a grave injustice.

A second consideration for applying Michigan v. Long to federal habeas cases is conserving costs to the criminal justice system. Any argument that a Sykes analysis can be handled efficiently

without the use of the standard in Michigan v. Long is belied by the very facts in this case. The district court made a detailed analysis to ascertain what the state court had, and had not, deemed waived -- in addition to determining whether that waiver had been forgiven. It was only after these procedural ambiguities were resolved that the district court ordered an evidentiary hearing and appointed counsel to assist Mr. Harris. Then, after three days of hearing evidence on all aspects of the ineffective assistance of counsel claim, the district court found against Mr. Harris on the merits.

This bifurcated process began anew when Mr. Harris sought review by the court of appeals. All three judges studied and deliberated the state court opinion and were frustrated in their

attempt to discern its meaning from the plain language of the decision itself. The fact that one judge on the court of appeals viewed the state court decision in the same manner as the district court had, while the majority came to a different conclusion, is proof that the decision fell short of a "plain statement" in regard to procedural default. The state court owes not just the indigent prisoner, but also the judiciary, a clear, honest statement of the status of collateral review so that federal courts can act or decline to act efficiently. Applying the standard announced in Michigan v. Long, as the instant case so clearly illustrates, would enable the federal judiciary to handle its responsibilities more expeditiously and more efficiently.

Of course, if the interest of streamlining the federal case load were the only concern, an ideal ruling from this Court would be to require every state court to make a ruling on federal issues so that federal review would always be possible. Then there would be no analysis needed under Sykes concerning the effect of the procedural default, or whether "cause and prejudice" had been shown, or whether in fact a miscarriage of justice had occurred. However, NLADA recognizes that under long-standing and appropriate concerns of comity such a decision requiring state courts always to rule on federal issues would be an anathema to the states, regardless of how beneficial it might be to indigent prisoners desirous of obtaining appellate review of their federal issues.

However, it is not necessary to make such a sweeping ruling to promote the interests of finality, judicial economy and fairness to indigent prisoners. The rule of Michigan v. Long would accomplish such a purpose. State courts could still control the content of their opinions, as well as the initial determination of federal collateral review. State courts could continue to decide a case on the basis of an adequate and independent state procedural ground, as long as the state court opinion clearly indicated its holding. Such a slight intrusion into the state judicial system should not offend comity, certainly given the alternative of forcing federal courts to "divine the meaning" of ambiguous state decisions such as the one before this Court.

These concerns are well expressed in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). In this case, the court of appeals denied the writ of habeas corpus sought by the petitioner, but remanded the case for a resentencing. Although the court of appeals has ordered a rehearing in banc and vacated the judgment pending this rehearing (828 F.2d 1498 (11th Cir. 1987)), a discussion of the Michigan v. Long rule in a specially concurring opinion by Circuit Judge Clark is still instructive:

> The Long "plain statement" rule is applicable in this case. ... First of all, such a bright-line rule fosters the comity and federalism concerns of Sykes by providing a consistent and predictable approach. Such a rule would not be unduly burdensome to the state courts, and those courts would retain their ability to enforce their procedural rules and to preclude federal review in appropriate cases. ...

* * *

> It would be an affront to the principles of comity and federalism to presume that the Florida Supreme Court was relying on procedural default absent express language in that court's opinion to that effect.
>
> 817 F.2d at 1487-88 (Clark, C.J., specially concurring)

Thus in evaluating the intrusion by federal courts in requiring "plain statements" about procedural defaults from state courts, this judge on the court of appeals gave greater weight to the interests of defendants and the preservation of federal claims. The interests of indigent prisoners and the federal judiciary are similarly better served by removing the initial level of litigation over the meaning of an ambiguous state court holding.

Finally, as a national organization, NLADA is very concerned about the

conflict in the standards applied by the various circuit courts of appeal, as well as with apparent conflicts within the same circuit. The need for one workable, fair and cost-effective standard is of paramount concern. The discussion by the court of appeals in Phillips v. Smith, 717 F.2d 44 (2d Dist. 1983), cert. denied, 465 U.S. 1027 (1984), analyzes the many different approaches.

The court of appeals in Phillips discusses the "exclusive reliance" standard applied in the Fifth, Ninth and Eleventh Circuits, holding that Sykes does not bar federal habeas review of federal constitutional claims unless the state court "exclusively relied" on the defendant's procedural defaults. Phillips also discusses the "alternative holding" perspective of the Third and Seventh Circuits, which precludes federal

review because of a state procedural default whenever the state court relied in any way on an adequate and independent state procedural ground, notwithstanding that in the alternative the court may have ruled against the petitioner on the merits. Phillips further discusses the "more flexible" standards of the Sixth and Eighth Circuits, applying the procedural default rule in Sykes only if the state court relied "primarily" on the procedural ground; this approach necessitates an analysis of the intention of the state court. In applying the view of the "alternative holding" circuits, the court in Phillips was guided by Michigan v. Long to determine whether the state court had made a "plain statement" of its intention to rule against the defendant because of the procedural default. 717 F.2d at 50 and n.2.

The Court of Appeals for the Seventh Circuit, whose decision is now before this Court, has not always been uniform in deciding when procedural default will prevent an ineffective assistance of counsel claim from surviving for federal collateral review. See, e.g., United States ex rel. Barnard v. Lane, 819 F.2d 798 (7th Cir. 1987), in which the court of appeals affirmed the district court's grant of a writ of habeas corpus. A unanimous court held that ineffective assistance of appellate counsel was good "cause" under Sykes for the petitioner's failure to present his ineffective assistance of trial counsel claim on direct appeal in the Illinois court. The court of appeals also held that the defendant had been prejudiced by that procedural default and that he had not

waived habeas review of that claim. 819 F.2d at 801, 805.

Mr. Harris would be hard-pressed to reconcile the court of appeal's ruling in favor of Mr. Barnard on the issue of procedural default of appellate counsel with his own treatment on the same issue. The apparent inequities that result from a lack of one workable rule such as in Michigan v. Long are striking in Mr. Harris's case. Such inequities will continue to result if federal courts continue to second-guess ambiguous state opinions or if the federal courts make a presumption in favor of procedural default which the state court may never have intended. The claims of indigent prisoners, and the lives of indigent prisoners in capital cases, should not depend on the fortuitous circumstance of

where in the federal judicial system these prisoners reside.

Currently, there are approximately 570,519 prisoners in this country,[2] of which over 90 percent are indigent[3] and 2,021 are on death-row.[4] At the initial level when seeking a writ of habeas corpus, a majority have to proceed pro se or with volunteer counsel and "earn the right" to obtain the assistance of counsel.[5] Without any clear indication

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2 U.S. Department of Justice, Bureau of Justice Statistics, as of June 30, 1987, reported in a press release issued September 6, 1987.

3 Alvin J. Bronstein, Executive Director, National Prison Project of ACLU Foundation, Inc.

4 "Death Row, U.S.A.," March 1, 1988, newsletter published by the NAACP Legal Defense and Educational Fund, Inc.

5 Mary Broderick, Director of the Defender Division, NLADA.

from this Court of a uniform standard to be applied, such as that in Michigan v. Long, these persons may well lose the last -- or in some cases the only -- federal review of their federal claims. As a national organization, NLADA is concerned that the lack of a uniform standard will lead to disparate and unfair results.

CONCLUSION

The "plain- statement" rule of Michigan v. Long which applied on direct appeal in regard to issues of state substantive law should be applied to federal habeas review concerning matters of state procedural default. Such a ruling would be workable, fair and cost-effective, as well as not offensive to principles of comity or to the Court's policy in Wainwright v. Sykes. Such a policy would simplify habeas petitions while not undermining federalism. Most important, ambiguities precluding review of federal rights would be resolved in favor of the indigent prisoner who may have reached his last line of review.

For these reasons, this Court should reverse the decision below.

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AMICUS CURIAE

BRIEF

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Attorney General of the State of Illinois,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL SEVENTH CIRCUIT

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QUESTION PRESENTED

When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, should that ambiguity be resolved in favor of affording habeas review of the constitutional claim.

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INTEREST OF AMACUS CURIAE

The State of Florida, through its Attorney General, respectfully offers this brief in support of respondents Marion Reed, Warden and Neil F. Hartigan, Attorney General of the State of Illinois. Amicus will be affected by the outcome of the decision in this case since the exact issue has been and will continue to appear in habeas corpus petitions filed in federal court. Amicus believes that resolution of the issue, as suggested, will greatly lessen the load of federal courts which are, unnecessarily, considering issues that have been procedurally defaulted.

SUMMARY OF THE ARGUMENT

Wainwright v. Sykes, infra, is based on the premise that the judgment of conviction rests, not on the federal question, but on the procedural default. Once a judgment of conviction is finalized through completion of the appellate process, that judgment continues to rest on an independent ground throughout any state collateral attacks until such time as the state courts, through unambiguous language, in the collateral proceeding, say the judgment no longer rests on the procedural default but on the then decided federal question. Until such occurs it cannot be said the state court "waives the waiver." Any less requirement would do violence not only to finality, but to comity and strain relationships between state and federal courts.

ARGUMENT

For purposes of argument Amicus would re-phrase the question as follows:

> May a federal court consider a procedurally defaulted issue that had not been raised on direct appeal on the grounds that ambiguous langauge by the state appellate court in denying post conviction relief constituted a ruling on the merits where the post conviction proceeding was not the proper forum to raise the issue and the merits were not discussed by the state appellate court.

This Court has held that even where a federal question has been procedurally defaulted because it was not raised at the state trial level, if, on direct appeal of the judgment of conviction, the state appellate court ignores the default and rules on the merits of the federal question, a federal court, setting in habeas, may also consider the merits of the question. County Court of Ulter County, New York v. Allen, 442 U.S. 140

(1979). Mullaney v. Wilbur, 421 U.S. 684, footnote 7 (1975).

In the instant case, however, as is occuring in many habeas cases, the federal question was defaulted not only at the trial level, but at the appellate level, since it was neither raised nor considered on direct appeal of the judgment of conviction. It was presented for the first time in a motion for post conviction relief. Harris v. Reed, 822 F.2d 684 (7th Cir. 1987). Failure to raise an issue at the trial level, where required by state law, constitutes a procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977). Even if the federal question is raised at the trial level, if it is not thereafter raised on direct appeal from the judgment of conviction it will constitute a procedural default. Murray v. Carrier, 477 U.S. 478 (1986), Smith v. Murray, 477 U.S. 527 (1986).

In the instant case, the federal question was one which, under state law could have been raised on direct appeal and failure to do so " . . . waives the issue for post-convcition review."[1] Harris v. Reed, at 686. Similarly in Florida, as in many states, federal questions, which could have or should have been raised at the trial level and on direct appeal, are deemed waived and may not be raised by way of motion for post conviction relief. Raulerson v. State, 420 So.2d 567 (Fla. 1982). Recently the Court of Appeals for the Eleventh Circuit recognized this to be the rule in Florida, citing Florida's Raulerson decision. Buford v. Dugger, 841 F.2d 1057 (11th Cir. 1988).

---

[1] Whether the state of Illinois has a legitimate state interest in a rule requiring ineffectiveness of counsel claims to be raised on direct appeal is another matter. For purposes of this brief Amicus will assume the the procedural requirement has a legitimate state interest.

Nevertheless, state prisoners in Florida, as in other jurisdictions -- and indeed, as in the instant case -- continue to raise these defaulted issues in post conviction state habeas proceedings. Often, in affirming denial of such post conviction motions, a state appellate court will render an ambiguous statement from which it is difficult, if not impossible, to determine whether the affirmance is based on the procedural waiver or a ruling on the merits of the federal question. The lower court in the instant case held that it cannot be presumed that such ambiiguous statements constitute a ruling on the merits. On the other hand, other circuits, such as the Court of Appeals for the Eleventh Circuit, construe such ambiguous statements as a ruling on the merits. See Mann v. Dugger, __ F.2d __ (1988) (Case No. 86-3182, decided April 21, 1988) footnote 4, where the court en banc said:

> "We find that the claim is not procedurally barred. Although petitioner failed to raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional infirmity in the trial." Mann v. State, 482 So.2d 1360, 1362 (Fla. 1986)(emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim.

See also Rosenfeld v. Dunham, 820 F.2d 52 (2nd Cir. 1987) at 55 where the simple statement "they do not merit" was considered a ruling on the merits.

Amicus submits that there are numerous reasons why, at least in post conviction proceedings, such ambiguous statements should not be construed as a ruling on the merits of the federal question.

First, Wainwright v. Sykes, 433 U.S. 72 (1977) is based on the premise that the state judgment of conviction is predicated, not on the federal question, but on an independent and adequate state ground; viz: the procedural default. In Florida, and, we presume, in most states, that judgment becomes final upon completion of the appellant process. McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987). In Griffith v. Kentucky, 479 U.S. 314 (1987) footnote 6, this Court also defined finality:

> "By 'final' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."

Where that judgment has become final, untainted by any erroneously decided federal question, due to the procedural default,

comity demands that it not be lightly overturned. When, a state prisoner in a post conviction proceeding collaterally attacks his final judgment of conviction he cannot possibly contend that that judgment rests on an erroneously decided federal issue. He simply cannot, because that issue was never decided in arriving at the finality of the judgment. It goes without saying that if in the collateral proceeding the state courts ignore the federal question and deny the collateral attack, without comment, the judgment continues to rest on an independent state ground and not on any erroneously decided federal question.

Even where, in a collateral attack on the judgment, a state court comments on, or even decides the federal question, it cannot be said that the final judgment of conviction no longer continues to rest on an independent and adequate state ground. It continues, we

submit, to rest on that state ground until such time as, through unambiguous language, the state court "waives the waiver" and decides the federal question in a manner that makes it unmistakeably clear that the final judgment of conviction no longer rests on the procedural default, but on the decided federal question.

Ambiguous language should not be construed as constituting a "waiver of the waiver" because it would do violence not only to finality, but to comity. Before deciding that a state court, in a post conviction proceeding ruled on the merits of a federal question, a federal court should be able to explain what was decided by the state court, that is, what did the state court say concerning the issue? Respect for federalism and the dual role of state and federal courts demands that a federal court not strain to find that a state court ruling is based on

the merits of a federal question simply because that court is hell bent on reaching that question.

Moreover, even where a state court, in a collateral proceeding tangentially decides the previously defaulted federal question, that should not, without more, give license to federal habeas intervention in the judgment of conviction. Federal intervention is warranted only where it is clear that the judgment of conviction itself no longer rests on the procedural default, but on the collaterally decided federal question. If, for instance, a state prisoner collaterally attacks his judgment of conviction on the grounds that his trial counsel had been ineffective for failing to raise a federal question, a state court might resolve the claim by ruling that under the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), the federal claim would have been

decided against the prisoner anyway. In deciding the federal question, tangentially to the ineffective claim, it cannot be said that the judgment of conviction no longer rests on the federal question. The judgment of conviction continues to rest on the procedural default. Only the collateral judgment rests on the federal question. In a subsequent habeas proceeding a federal court should have license to re-examine the tangentially decided federal question, but only as it applies to the ineffectivenss claim.

Second, County Court of Ulster County New York v. Allen, 442 U.S. 140 (1979) is distinguishable. In that case, the constitutional issue had been procedurally defaulted at the trial level. However, unlike the instant case, in Ulster County, it was raised on direct appeal of the judgment of conviction. Thus in Ulster, the judgment of conviction had not yet become final when the

state appellate court, ignoring the trial level procedural default, ruled on the merits of the issue. There is no disrespect for finality or comity in such a scenario because the judgment of conviction is not finalized without deciding the federal question.

Third. We recognize that there may be a sound policy reasons for allowing federal re-examination of a procedurally defauted question that has, nevertheless, been considered, discussed and ruled upon by a state appellate court on direct appeal. In the first place, the judgment of conviction is not yet "final" as that term has been defined by this Court in the retroactivity cases. Griffith v. Kentucky, 479 U.S. 314 (1987), see supra, for definition. However, as the retroactivity cases teach, once final, the judgment of conviction should not be lightly overturned by a newly decided federal question -- more so we submit, by a procedurally defaulted federal

question. In the second place, if the state appellate court, on direct appeal, erroneously decides the question, its decision will remain uncorrected by virtue of the trial level default and serve as precedent. We would emphasize, however, that where there is no discussion of the federal question by the state appellate court on direct appeal, its opinion serves no precedential value. Even if the state appellate opinion, contains some ambiguous language that is subject to being interpreted as a merits ruling, without discussion, it could serve no precedential value. This is especially true where the federal question is not raised on direct appeal but for the first time, in a collateral attack on that judgment.

Strained interpretations, of ambiguous state court rulings, by federal courts in order to reach federal questions is especially troubling in capital cases. Under the

"hydraulic pressure"[2] exerted by eleventh hour post conviction petitions, raising innumerable issues, state courts often reject questions that should have been raised at a prior stage through terse statements such as "the claim is without merit." Such a statement is as subject to the interpretation that the claim is without merit because it should have been raised at a prior stage as any other. When a federal court hastens to interpret such a statement as a ruling on the merits, tension in the federal system results.

Finally, this Court has consistently held that where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to the want of proper presentation in the state courts, unless the aggrieved party can

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[2] Evans v. Bennett, 440 U.S. 1301, 1307 (1979) Rehnquist, Chief Justice, then Justice as Circuit Justice.

affirmatively show the contrary. Street v. New York, 394 U.S. 576 (1969), Fuller v. Oregon, 417 U.S. 40 (1974), Exxon Corporation v. Eagerton, 426 U.S. 176 (1983), Webb v. Webb, 451 U.S. 493 (1981).

We recognize that in those cases, this Court was concerned with the jurisdictional prerequisits for certiorari jurisdiction; whereas, in the instant question the focus is on habeas consideration of procedurally defaulted issues. But, the analogy is strong. In the certiorari cases this Court has stated that the inquiry is whether the issue was presented to the state court in such a manner " . . . that it was necessarily decided . . ." Street at 581. No less should be required when a federal court, sitting in habeas, seeks to re-examine a procedurally defaulted federal question on the grounds that the state appellate court decided the issue.

CONCLUSION

This Court should clearly and unequivocally hold that a federal court sitting in habeas may not examine a procedurally defaulted federal question simply because it is raised in collateral proceedings in state court unless the state court's ruling makes it explicitly clear that the judgment of conviction no longer rests on the procedural default.

Respectfully submitted,

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MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL AND THE STATES OF MISSISSIPPI AND NORTH CAROLINA

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QUESTION PRESENTED

Does a state forfeit the benefit of the waiver doctrine where its reviewing court, after plainly stating the defendant is procedurally barred from obtaining relief, discusses the weakness of the merits of the case?

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Amici files this brief pursuant to Rule 36.4 of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is in support of that portion of the opinion below in Harris v.

Reed, 822 F.2d 684, 686-687 (7th Cir. 1987), which held that, where the state reviewing court relies both on a procedural bar and the weakness of the issues, the state defendant is barred from obtaining relief in the federal courts unless he meets the "cause and prejudice" standard.

California reviewing courts, as discussed in the argument portion of this brief, often rely on both the procedural bar and the weakness of the merits of the case when denying relief on appeal. The clear reason the state courts follow the foregoing practice is to inform the lower courts and the bar of the applicable law pertaining to the merits of the case. Further, the state court's practice shows the defendant that relief was not denied solely for technical reasons. Nevertheless, as shown herein, the Ninth Circuit

Court of Appeals holds that there is no procedural bar wherever a state reviewing court alternatively decides an issue on the merits. Thus, amici have a strong interest in ensuring that the state is not penalized by being denied the benefit of the waiver doctrine merely because the state reviewing courts, after finding there is a procedural bar, in the alternative, discuss the weakness of the merits of the case.

SUMMARY OF ARGUMENT

Amici urge that wherever a state reviewing court relies upon a procedural bar as an independent basis for denying relief (assuming the "cause and prejudice" standard has not been satisfied), the state defendant is procedurally barred from obtaining relief in the federal courts even if the state court rules alternatively on the merits of the

contentions.

State reviewing courts should not be penalized for performing the admirable task of advising the bar and the parties to the state appeal as to the law pertaining to the merits of the appeal. As long as the state plainly relies on a procedural bar, regardless of whether it also alternatively determines the weakness of the merits, the state defendant should be procedurally barred from obtaining relief in federal habeas corpus proceedings. (Caldwell v. Mississippi, 472 U.S. 320, 327 (1985), stating that the state defendant is procedurally barred [assuming the "cause and prejudice" standard has not been met] in federal habeas corpus proceedings where the state reviewing court relied on independent state procedural grounds.)

ARGUMENT

WHERE THE STATE REVIEWING COURT DECIDES AN ISSUE ON PROCEDURAL GROUNDS AND ON THE MERITS, THE DEFENDANT SHOULD BE PROCEDURALLY BARRED FROM OBTAINING RELIEF IN THE FEDERAL COURTS

Amici urge that a state defendant should be denied relief in federal habeas corpus proceedings under the waiver doctrine wherever the following circumstances exist: (a) the state reviewing court, although reaching the merits of the issues also states explicitly that the state defendant is procedurally barred from obtaining relief, and (b) the defendant has failed to show "cause and prejudice."

This Court has held that where a state reviewing court relies upon a procedural bar as an independent basis for denying relief (assuming the "cause and prejudice" standard has not been

satisfied), the state defendant is barred from obtaining relief in federal habeas corpus proceedings. (Caldwell v. Mississippi, 472 U.S. 320, 327 (1985); see also, Michigan v. Long, 463 U.S. 1032, 1041 (1983), upon which Caldwell relied.) Hence whenever a state reviewing court decides an issue alternatively on procedural grounds and then on the merits, the state court has set out an independent procedural basis for denying the defendant relief. Thus, under both Caldwell and Long, the state defendant (absent a showing of "cause and prejudice" should be procedurally barred from obtaining relief from this Court. This procedure is in accordance with this Court's policy of giving recognition to comity and finality of judgment. (Reed v. Ross, 468 U.S. 1, 10-11 (1984.)

In United States ex rel. Caruso v.

Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982), the Circuit Court observed that a state court, after ruling that the defendant is procedurally barred from obtaining relief on appeal, may also issue an opinion on the merits to show that its reliance on a procedural rule has not caused great injustice to the defendant. The court also stated that a state court may want to clarify an important issue. Thus, the court concluded that where a state reviewing court rules on the merits in addition to holding that the defendant is procedurally barred, he is entitled to no relief in federal habeas corpus proceeding unless he meets the "cause and prejudice" standard. This clearly is in accord with this Court's statement in Wainwright v. Sykes, 433 U.S. 72, 90 (1977), that the waiver doctrine ensures finality of

judgment as opposed to a "'tryout on the road'" to a federal habeas corpus hearing.

It is strongly urged that a state court, which relies on a procedural bar, should not be penalized where it also clarifies issues or insures the parties that even if there were no procedural bar, the defendant still would not prevail. California reviewing courts have strong interests in rendering decisions on the merits after invoking the procedural bar. For instance, a state reviewing court, after finding a procedural bar in the alternative, could rule that there is no merit to the defendant's contention so as to inform him that even in the absence of the procedural defect, he would not have prevailed. Further, counsel for the defense and counsel for the People have

an urgent need to know whether they have erred. This is due to the fact that in California, if it is held that a judgment is reversed because of ineffective representation, the reviewing court will report the matter to the State Bar for possible disciplinary action against defense counsel. Moreover, the same procedure is required if there is a reversal due to prosecution misconduct, that is, the prosecutor's name will be given to the State Bar for possible disciplinary action. (Cal. Bus. & Prof. Code, § 6086.7.)

In addition to the above reasons for alternatively deciding a case on the merits, trial judges need to be informed of the applicable law so that they will not make mistakes in the future.

California has ruled alternatively on procedural grounds and on the merits

in capital cases, especially regarding allegations of prosecution misconduct. (See People v. Hendricks, 44 Cal.3d 635, 649-650 [244 Cal.Rptr. 181, 189] (1988), and People v. Ruiz, 44 Cal.3d 589, 622 [244 Cal.Rptr. 217] (1988), and allegations of court misconduct, see People v. Melton, 44 Cal.3d 713, 753 [244 Cal.Rptr. 867, 899] (1988).) Also, in non-capital cases, the state reviewing courts have made alternative rulings. For instance, in People v. Solis, 172 Cal.App.3d 877, 885 [218 Cal.Rptr. 469] (1985), the Court of Appeal ruled alternatively on the issue of the admissibility of evidence and in People v. Redmond, 29 Cal.3d 904, 909 [176 Cal.Rptr. 780, 783] (1982), the California Supreme Court ruled alternatively on the propriety of the prosecutor's argument.

The Ninth Circuit's practice of

finding no procedural bar where the state reviewing court renders a decision on the merits after holding that there was a procedural bar (Bradford v. Stone, 594 F.2d 1294, 1296, fn. 2 (9th Cir. 1979)), penalizes California for performing the foregoing functions of advising the bar, the lower courts and the parties to the suit as to the applicable law. It is urged that this is contrary to one of this Court's key reasons for enforcing the waiver doctrine, namely, that "Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules." (Engle v. Isaac, 456 U.S. 107, 129 (1982).)

Thus, where a state reviewing court finds a procedural bar because of the defendant's failure to follow mandated procedures in the trial court, he should

be barred from obtaining relief in the federal courts even if the state court found alternatively that there was no merit to his contention.

CONCLUSION

For the foregoing reasons, amici respectfully submits that where a state court renders a decision on the alternative grounds of waiver and on the merits, the state defendant, providing he cannot show "cause and prejudice," should be barred from obtaining relief in the federal courts.

Respectfully submitted,

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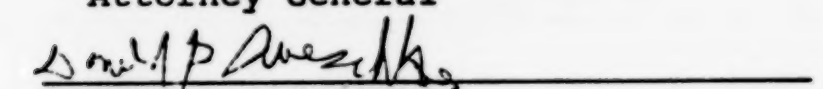

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PROOF OF MAILING--AFFIDAVIT

I, DONALD F. ROESCHKE, one of the attorneys for the People of the State of California, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of June, 1988, I deposited in a United States Post Office box located at the State Attorney General's Office, 3580 Wilshire Boulevard in Los Angeles,

California, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Amici Curiae Brief.

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SUBSCRIBED AND SWORN to before me at Los Angeles, California, this 9th day of June, 1988.

NOTARY PUBLIC in and for the State of California, County of Los Angeles.

LORRAINE J. EDGAR
NOTARY PUBLIC - CALIFORNIA
COUNTY OF LOS ANGELES
My Commission Expires April 18, 1992